

THE
PRACTICE OF THE LAW
IN
ALL ITS DEPARTMENTS;
WITH A VIEW OF
RIGHTS, INJURIES, AND REMEDIES,
AS AMELIORATED BY RECENT STATUTES, RULES, AND DECISIONS;
SHOWING
THE BEST MODES OF CREATING, PERFECTING, SECURING, AND TRANSFERRING RIGHTS;
AND
THE BEST REMEDIES FOR EVERY INJURY, AS WELL BY ACTS OF PARTIES THEMSELVES,
AS BY LEGAL PROCEEDINGS; AND EITHER TO PREVENT OR REMOVE INJURIES; OR
TO ENFORCE SPECIFIC RELIEF, OR PERFORMANCE, OR COMPENSATION.

AND SHOWING
THE PRACTICE
IN ARBITRATIONS; BEFORE JUSTICES; IN COURTS OF COMMON LAW;
EQUITY; ECCLESIASTICAL AND SPIRITUAL; ADMIRALTY; AND
COURTS OF APPEAL.

WITH NEW PRACTICAL FORMS.
INTENDED AS
A COURT AND CIRCUIT COMPANION.

—
IN TWO VOLUMES.

VOL. I.—PART I.
—

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L O N D O N :
C. ROWORTH AND SONS, BELL YARD,
TEMPLE BAR.

TO
THE RIGHT HONOURABLE
SIR THOMAS DENMAN, KNT.

Lord Chief Justice of England,

&c. &c. &c.

THIS WORK IS DEDICATED,

WITH

THE DEEPEST RESPECT

FOR THOSE

AMIABLE QUALIFICATIONS AND THAT INDEPENDENT

PUBLIC CONDUCT

WHICH SO EMINENTLY DISTINGUISHED HIM.

AS

AN ADVOCATE,

AND

ULTIMATELY RAISED HIM

TO

THE HIGH JUDICIAL SITUATION

HE NOW FILLS

WITH NO LESS HONOUR TO HIMSELF

THAN

BENEFIT TO THE COMMUNITY.

ADVERTISEMENT.

THIS WORK will be published in *four Parts*, with distinct Indexes to each, and the last containing a general Index of the whole, so that each Part will be complete in itself. This (the *first*) Part is *now* published. The *second* will be published in Easter Term next. The *third* and *fourth* (with all the improvements of the present Sessions) before next Michaelmas Term.

The object of this Work is to give a *practical* view of the present *improved law* relating to *Private Rights*, and the *best Remedies* for *Injuries*, so as to enable *all legal Practitioners* in every department not only to adopt the *best* means of creating, perfecting, securing, and transferring *Rights*, but also to select the *best* of several *Remedies*, and pursue the *most judicious* legal course, whether on behalf of a *claimant* or of a *defendant*: and whether by *preventing*, *abating*, or *removing* an Injury by his *own act*, or by *legal proceedings*, or to compel *specific relief* or *performance*, or enforce *compensation* for every description of Injury, as well by his own act, as by arbitration, or summary proceedings before a Judge, or before Justices of the Peace, or in Courts of Common Law, Equity, Ecclesiastical, or Admiralty; showing the modern and improved *Practice* in each. The Work is offered to the Public as a compact Summary of the Law as improved by modern Legislation ;

and it is hoped that it may not only assist *Students*, but also be found useful to *Legal Practitioners* in every department. One principal novelty in the undertaking is the collection and consideration of all the *different precautionary measures* to be observed, not only in *creating Rights*, but in *preventing Injuries*, and in the suggestion of the steps to be observed by all members of society, as well to prevent risk or loss, and preserve a right, or secure a defence. Several distinct chapters are therefore devoted to those important subjects; and as most of the Books of Practice hitherto published are confined to the proceedings of a *particular* court or courts, without giving a comparative view of the Jurisdiction and Practice of others, or suggesting *which* of *several* Remedies may be *preferable*, it has been the object of the Author to endeavour, in the following pages, to supply those obvious defects.

February 25, 1833.

PREFACE.

I HAVE attempted in the following work to give a concise but *practical* view of the principal *legal* and *equitable rights* of individuals; of the *injuries* and *offences* affecting the same; and the *best remedies* and *punishments* for such injuries, whether by acts of the parties themselves, or by the intervention of legal proceedings; and as well to prevent or remove the injury as to enforce *specific relief*, or *performance*, or *compensation*, or *punishment*; and as each proceeding has been improved by recent enactments, rules, and decisions. One object has been to assist *Students* by affording them a compact view of the present law nearly in the same arrangement as adopted by Blackstone, and so as to form a *practical continuation* of that admirable work. But the chief object has been to assist *Practitioners* in every branch of the law, so that every individual, although practising principally in *one department* or in a particular court, may be enabled at once to observe

the general rules and practice affecting the *whole*, and thereby be enabled to suggest to his client the *best remedy*, though in a different course to that which he has usually adopted.

The principal novelty in this undertaking will be found in the *practical suggestions* interspersed relative to the *improvements* to be introduced in creating, perfecting, transferring, and securing *rights*, and in the *precautionary measures* to be observed as well antecedent to as pending litigation, and in the *choice* of the *best* of several remedies,—matters which will be found most essentially to influence the result. In the early part of the work I have considered the maxim, “Laws for *prevention* of injuries are preferable to those for punishment, or even compensation,” as a text well worthy of examination, comment, and arrangement; and from the very able and admirable work of Sir E. B. Sugden, respecting Vendors and Purchasers, (a) I have derived most valuable suggestions upon the great importance of *precautionary measures* in general, and have arranged a class of rules calculated to assist in most of the difficult or ordinary transactions of life, so as to place the party observing them on the *vantage* ground in case of subsequent litigation. The mode in which I have treated the subject may perhaps be considered by some as tending to diminish litigation. But if it were so, I can anticipate that the work would be the more acceptable to the practitioners of a high and honourable profession. The observance of the rules will, however, rather affect the *manner* of litigation than the *quantity*.

I have throughout the work considered not only

(a) Sugden, Vendors and Purchasers, 8 ed. Introd., and *per tot.*

injuries and offences to *individuals*, which are remediable by *action* or *civil* remedies, but also all OFFENCES which more particularly affect an individual and his private right, and the appropriate *punishments*, and when it may be preferable to enforce the *latter*, than to proceed by *action*, so that *every species* of proceeding are submitted for consideration and selection.

The *first* volume relates principally to matters *antecedent* to the commencement of any suit. The *second* volume states in detail the *practical modes* of conducting every proceeding which can be termed litigation; as before *Arbitrators*, whether compulsory or voluntary; before Justices of the Peace; in all the Courts of Common Law; in Courts of Equity; in Ecclesiastical and Spiritual Courts; in the Court of Admiralty and Prize Court; and in the Courts of Appeal from each of those tribunals.

In considering the *practice* of each of these courts I have attempted to follow the same scientific and admirable plans adopted by Mr. Tidd, as regards Courts of *Law*, and some others, as respects *other* courts, in their very valuable works; and every modern rule of court and decision will be found incorporated. I beg, as an instance, attention to the head *Brief* in particular. I have there attempted to suggest, (it is hoped usefully,) some rules to be observed in preparing the same and the evidence, and the different parts of the Brief, as well at law as in equity, so as most advantageously to try an action at law or obtain a hearing in equity. Some *forms*, not previously in print, will be found interspersed, so as to elucidate or assist on emergencies.

An *Analytical* Table of rights, injuries, and remedies, precedes the first chapter of the first volume, and in which I have attempted to show the injuries which

usually affect each right, and the several remedies for each, whether for prevention, compensation, or punishment; and the subscribed notes will show the authorities in proof of each position. Parties themselves and their professional advisers will thereby at one view perceive the different remedies afforded in each case, and be enabled, by very little further inquiry and consideration, to adopt the best.

The *first* chapter of this part is *introductory*, and not so immediately practical as the following; but I have considered it important for the student, as for all practitioners, to state the *general* rules affecting *all* rights, injuries, and remedies, whether public or private, with some principal rules for the selection of the best of several remedies.

At the head of each subsequent chapter will be found an analysis of its contents, and in general referring to each page of the work where the subject is discussed.

The *second* chapter relates to rights affecting the *Person*, whether absolute or relative, and the *injuries* and *offences* and *remedies* and *punishments* affecting or applicable to the same.

The *third* chapter relates to Rights to *Personal Property*, and the injuries, offences, and remedies and punishments affecting or applicable to the same.

The *fourth* chapter relates to *Real Property*, whether corporeal or incorporeal, and Chattels Real, and the rights, injuries, offences, and remedies and punishments relating to the same. To this chapter in particular I invite attention, as an attempt to compress and take a practical view of the law upon the subject, and which may, it is hoped, assist as a collection of most of the *modern* rules and decisions on the subject. An attempt has also been made to arrange all the recent enactments and decisions relating to malicious and other

injuries to real property, with their proper remedies and punishments.

The *fifth, sixth, seventh, and eighth* chapters principally relate to the *precautionary and other measures to defend, resist, prevent, abate or remove* injuries of every description, whether by acts of parties themselves and others, or by the intervention of legal authority.

The *fifth* chapter in particular states the rules to be observed to *perfect rights* and *prevent* injuries, before even the *inception* of the latter, and as well in the absence of any contract as in cases of contract. The analysis at the head of that chapter will more fully show its contents.

The *sixth* chapter supposes that an *injury* has been *in part* committed, or *is continuing*, and that still *before* litigation some precautionary measure should be adopted, either in the absence of contract, or where the injury would constitute a breach of contract.

The *seventh* chapter contains rules, the knowledge of which is essential to every member of society, if he wish to travel safely through life, and the nonobservance of which occasions so much loss and expense. It states all the remedies, by defence, resistance, or prevention of injuries to the person, personal property, and real property; when a party may, and how resist illegal process or imprisonment; when relations or strangers may interfere; when and how offenders may be apprehended by private individuals without warrant or process; when nuisances or other injuries may be removed or abated, and the consequences of excess in all the modes of defence, resistance, arrest, abatement, or removal of a nuisance; when recaption, or obtaining restoration of the person, or that of a relation, or of personal or real property may be obtained without any legal assistance; and when satisfaction of rent, or for trespasses or debts, may be enforced by distress, or set-off, or retainer.

The *eighth* chapter supposes the necessity for the intervention of *legal proceedings* to prevent or remove an injury. Here the practice of obtaining a judge's warrant to prevent a *Duel*; the interference of justices to prevent a fight, or other breach of the peace; *security for keeping the peace*, is fully considered; the practice in obtaining release from imprisonment by writ of *habeas corpus*, or discharge on a more summary proceeding; and lastly, the extensive jurisdiction, for the *prevention* of injuries, by the *injunction of a Court of Equity*, in cases of attempted or actually commenced injury, whether to the person, personal property, or real property. The practice is fully considered in obtaining *injunctions* in certain cases for the protection of the *person*, or to prevent injuries to *personal property*, occasioned by frauds of partners or agents, or to restrain the negociation of bills, or have deeds delivered up, or to have proper security given, or to prevent breaches of trust, or of contracts, or other loss; and to prevent the sailing of ships, or piracy of copyrights; and as respects *real property*, to prevent wasteful trespasses, to quiet possession, to prevent waste or nuisances, whether private or public, and to prevent improper litigation; or attempts to evade justice, as to restrain actions, bills of interpleader, and motions at law under the recent act; writs *ne exeat regno*, and bills to perpetuate testimony, &c.

The *ninth* chapter contains a practical view of the *Statutes of Limitation*, and those limitations in modern acts of proceedings against justices and other persons acting officially, or in exercise of the powers of a particular act. The operation of these acts, as well at law as in *Courts of Equity*, and in *Ecclesiastical Courts*, &c. are stated; and then are considered some consequences of delay in other respects, which either

absolutely bar or prejudice legal or equitable proceedings.

The *tenth* chapter shows the remedies, as well summary as more formal, at law and in equity, to compel *specific relief or performance*, and when proceedings can only be had for compensation in damages, or for punishment. The proceedings by *mandamus* and otherwise, to compel the *performance* of specific acts, or by replevin, or action of detinue, to recover a specific chattel, are considered: and then the extent of the jurisdiction of Courts of Equity on bills *for specific performance* are practically examined. Proceedings of a like nature for restitution of conjugal and other rights in courts ecclesiastical and spiritual, and in courts of admiralty, are lastly considered, and which concludes the first volume of this work.

The *second* volume supposes an injury to have been complete, and that no statute of limitations or other circumstance has completely barred a proceeding for redress; and then the *eleventh* chapter considers the retainers and rights and duties of attorneys, solicitors, proctors, and every agent connected with legal proceedings: then follow the details of every description of proceeding to obtain redress, from its commencement to its conclusion, and the particulars of which will be enumerated at the commencement of the second volume.

Each part contains a *temporary index*, for facility of reference, and when the whole work has been printed a general table of contents will be prefixed, and at the end of the second volume will be found a very full index.

J. C.

*Chambers, 6, Chancery Lane,
25th Feb. 1833.*

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ANALYTICAL TABLE

OF

RIGHTS, INJURIES, AND REMEDIES.

Res per divisionem melius aperiuntur:

N.B.—The numbers at the beginning of each note refer to the body of the work.

1. Subject-matter.	2. Rights.	3. Injuries and Offences.	4. Remedies and Punishments.
I. THE PERSON. 1. Own	1. Personal Security. 1. Life.....	1. Homicide	1. Prevention. 1. Self defence.(a) 2. By third person.(b) 3. Justices, lunatic.(c) 4. Sureties of peace.(d) 5. Articles, K. B.(e) 2. Compensation. 1. No appeal or action.(f) 2. Allowance to widows.(g) 3. Punishment. 1. Indictment, murder.(h) 2. Indict., manslaughter.(i) 3. Homicide, justifiable.(k) 1. Prevention as above. 2. Action.(l) 3. Indictment.(m) Indictment, misdemeanor.(n) Indictment, felony.(o) Indictment, misdemeanor.(p) Indictment, felony.(q) 1. Prevention. 1. Surety, peace.(s) 2. Judge's warrant.(t) 3. Articles, K. B.(u) 2. Punishment. 1. Information, K. B.(x) 2. Indictment.(y)
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		4. Attempt to cause mis- carriage	
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		7. Challenges (r)	

(a) 30, 33. When life is in immediate danger may kill assailant. 1 East, P. C. 279; 9 G. 4, c. 31, s. 10.

(b) 33. May break outer door to prevent. 2 Bos. & Pul. 260.

(c) 33. 39 & 40 G. 3, c. 94, s. 3; 7 B. & C. 669.

(d) 33. *Post*, c. viii.

(e) *Ibid*.

(f) 33. *Appeal* taken away, 59 G. 3, c. 46. *Civil remedy merged*.

(g) 33. 6 G. 4, c. 108, s. 61; 7 G. 4, c. 64, s. 30.

(h) 33. 9 G. 4, c. 31, s. 2 to 14; 2 & 3 W. 4, c. 75, s. 16. Indictment for murder, when malicious; when not, for manslaughter.

(i) *Id. Ibid*.

(k) Is so in necessary defence of life, or to prevent a forcible felony. 1 East's P. C. 271, 279; 9 G. 4, c. 31, s. 10.

(l) 10. After acquittal. 12 East, 409.

(m) 34. 9 G. 4, c. 31, s. 9. What is grievous bodily harm, Holt, C. N. P. 469.

(n) 34.

(o) 35. 9 G. 4, c. 31, s. 13.

(p) 35. 9 G. 4, c. 31, s. 14. *Quære*, if child still born, *Id. Rex v. Southern*, 1 Burn's J., 26 ed. 611. Indictment not to be for murder unless evidence of killing be clear.

(q) 36. 4 G. 4, c. 54, s. 3.

(r) 36.

(s) 36. *Post*, c. viii.

(t) *Id. Ibid*.

(u) *Id. Ibid*.

(x) 36. 1 Burr. R. 316; 3 East's R. 581; 6 East, 464, 471; 2 B. & Ald. 462.

(y) 36.

1. Subject-matter.	2. Rights.	3. Injuries and Offences.	4. Remedies and Punishments.
1. THE PERSON. 1. Own (continued.)	1. Personal security. 1. Life (continued.) 2. Limbs 3. Body	8. Fights 1. 2. 3. Assaults, bat- teries, wounding and mayhem (b) 1. Common assaults and batteries (b) 4. Special assaults 1. Clergyman. (n) 2. Magistrate (n) 3. Officers. (n) 4. Attempt to com- mit felony. (n) 5. To prevent ap- prehension. (n) 6. To raise wages. (n) 7. On seamen, &c. (n) 8. To impede sale of provisions. (n) 9. Assaults on deer- keepers. (n) 10. On custom or excise officers. (p) 5. Assaults with intent to murder 6. Assaults and attempts to maim, &c. 7. Assaults to commit unnatural crime .. 8. Assaults to rob	1. Prevention. 1. Duty to prevent. (z) 2. Surety, good behaviour. (a) 1. Prevention. 1. Self-defence. (c) 2. Defence of relation. (d) 3. Defence by stranger. (e) 4. Justices, surety, peace. (f) 5. Articles, K. B. (g) 6. Justices, lunatic. (h) 2. Compensation. By justices. (i) Action, trespass. (k) 3. Punishment. Indictment. (l) Summary proceeding. (m) 1. Prevention as above. 2. Compensation by action. 3. Punishment. (n) Punishment. (o) Punishment. (p) 1. Prevention as above. 2. Compensation, action. (q) 3. Punishment, indictment, fe- lony. (r) 1. Prevention as above. 2. Compensation, action. (y) 3. Punishment. (s) Indictment, misdemeanor (t) Indictment. (u)

(z) 36.

(a) 38. *Post*, c. viii.

(b) 37, 38. Assaults, batteries, bruises, contusions, woundings, and mayhems defined.

(c) 38. With force, not using dangerous weapons, 2 *Rol. Ab.* 546; 2 *Saund.* 5; c. vii.(d) 38. With force, by husband, wife, parent, child, apprentice or servant. 2 *Rol. Ab.* 546; *Owen*, 151, c. vii.(e) *Molitor manus*, 2 *Stra.* 954; c. vii.

(f) 38. c. viii.

(g) *Id.* *Ibid.*(h) 39 & 40 *Geo.* 3, c. 94, s. 3; 7 *B. & C.* 669.(i) 38. When common, under 5*l.* damages. 9 *Geo.* 4, c. 31, s. 27 to 29, 33 to 35; 1 *B. & Adol.* 382.(k) 26, 27, 38. *Restrained* as to costs, if no special plea nor judge's certificate, and damages under 40*s.*(l) 38. *Common*, at common law, 3 *Bl. C.* 121; or *special*, 9 *Geo.* 4, c. 31, s. 27 to 29.(m) 9 *Geo.* 4, c. 31, s. 27, penalty 5*l.* to county rate.(n) 38. *Ibid.* s. 23 to 29.(o) 7 & 8 *Geo.* 4, c. 29, s. 29.(p) 6 *Geo.* 4, c. 108, s. 56, 57, 59.(q) 11. After trial of indictment, 12 *East*, 409.(r) 38. 9 *Geo.* 4, c. 31, s. 11, 12, 25.(s) 38. 41. *Ibid.* s. 12.(t) 38. 9 *Geo.* 4, c. 31, s. 15, 18, 21.(u) 38. 7 & 8 *Geo.* 4, c. 29, s. 6, a misdemeanor at common law, *Burn's J. Threats*.

1. Subject-matter.	2. Rights.	3. Injuries and Offences.	4. Remedies and Punishments.
1. THE PERSON. 1. Own (continued.)	1. Personal security. 2 & 3. Limbs and body (continued.)	9. Assault with intent to commit any felony 10. Furious driving.... 11. Setting spring guns. 5. Menaces and Threats. 1. Common threats 2. Threat of mur- der 3. Threat of burn- ing house, &c. ... 4. Threats to pro- perty, <i>post.</i> 5. Setting spring guns, &c. 6. Rapes 7. Carnal knowledge of child 8. Indecent exposure .. 9. Abduction for fortune 10. Abduction of females and children under sixteen 11. Bigamy 12. Deceptive marriage. 13. Unnatural offence..	Indictment, misdemeanor. (x) Indictment. (y) Action for damage. (z) Indictment, misdemeanor (a) 1. Prevention. 1. Defence. (b) 2. Justices, lunatic. (c) 3. Surety, peace. (d) 4. Articles, K. B. (e) 2. Compensation. Action per quod. (f) 3. Punishment. Indictment. (g) Indictment. (h) Indictment. (i) Indictment. (j) Action for injury. (k) 1. Prevention. Self-defence. (l) By any person. (m) 2. Punishment. Indictment, capital. (n) Indictment, assault. (o) Indictment, felony. (p) Indictment, assault. (q) Indictment, common law. (r) Indictment. (s) Indictment. (t) Indictment. (u) Action for deceit. (v) Indictment, conspiracy. (x) Information. (x) Forfeiture of property. (y) Indictment, capital. (z) Indictment, misdemeanor. (a)

(x) 38. 9 Geo. 4, c. 31, s. 25.

(y) 38. 1 Geo. 4, c. 4.

(z) 39. 4 Bing. 39.

(a) 39. 7 & 8 Geo. 4, c. 18, s. 1; 4 Bing. 643.

(b) 39. With force, 2 Rol. Ab. 546; 2 Saund. 5;
if by stranger, *mol. man.*, 2 Stra. 954.(c) 30. 39 & 40 Geo. 3, c. 94, s. 3; 7 B. & Cres.
669. Burn's J. Lunatics.

(d) 39. Ch. viii.

(e) *Id.* Ibid.(f) 39. Trespass, 2 Lutw. 1428; Regist. 104;
Co. Lit. 161; 6 East, 126, 133; 3 Bla. C. 120.(g) 39. 6 East, 126; Threat to servants, 5 Geo. 4;
Burn's J. Threat. Servant, *post.*

(h) 39. 4 Geo. 4, c. 54, s. 3.

(i) 39. *Ibid.*

(j) 7 & 8 Geo. 4, c. 18, s. 1.

(k) 4 Bing. 643; 8 B. & Ald. 304.

(l) 39. 1 Hale, 485, may even kill aggressor.

(m) 39. With force.

(n) 39. 9 Geo. 4, c. 31, s. 16 to 18, sufficient to
prove penetration.

(o) 39. When not inception of rape.

(p) 40. 9 Geo. 4, c. 31, s. 17, 18.

(q) 40.

(r) 40.

(s) 40. 9 Geo. 4, c. 31, s. 19.

(t) 40. *Ibid.* s. 20.(u) 41. *Ibid.* s. 22. 1 East, P. C. 464 to 472.

(v) 41. After conviction. MS. decision.

(x) 41. 3 Ves. & B. 175.

(y) 41. 54. 55. Marriage Acts, 4 Geo. 4, c. 76,
s. 23.

(z) 41. 9 Geo. 4, c. 31, s. 15, 18.

(a) 38. 41. 9 Geo. 4, c. 31, s. 25.

1. Subject-matter.	2. Rights.	3. Injuries and Offences.	4. Remedies and Punishments.
I. THE PERSON. 1. Own (continued.)	1. Personal security. 2 & 3. Limbs and body (Continued.)	14. Injuries from negligence and nuisance. 1. Leaving trap-door open 2. Leaving dangerous dog or animal loose 3. Consequences of other acts, or negligence 4. Unsound steam-engine 15. Injuries to person in general	Action, case. (b) Indictment, if a public nuisance. Action, case. (c) Indictment. (d) Action, case. (e) Indictment. (d) Indictment and costs. (f) Remedies in general. (g)
	4. Health	1. By private nuisances 2. By public nuisances 3. Breaking quarantine 4. Unwholesome food ..	1. Prevention. 1. Prevention by party. (h) 2. Injunction. (i) 3. Abatement. (k) 2. Compensation. 1. Action on case. (l) 2. Assize of nuisance. (m) 3. Quod permittat proster- navit. (n) 1. Prevention. 1. Prevention by party. (o) 2. By injunction. (p) 3. Abatement. (q) 4. By a judge. (r) 2. Compensation. Action, when. (s) 3. Punishment. By indictment. (t) Indictment. Penalties. (u) 1. Prevention. Seizure of flour, &c. (x)

(b) 41. 3 Campb. 398, 403; 5 B. & Cres. 519; 4 Taunt. 649; 4 Campb. 262; 4 C. & P. 262.

(c) 41. 4 Car. & P. 297; 5 C. & P. 1; 4 Com. Dig. Action, Negligence, A. 5.; *post*, c. vii.

(d) Indictment lies for letting a dangerous animal go at large, Burn's J. Nuisance, 11.

(e) 41. Driving carriages, 4 B. & Cres. 223; 1 Car. & P. 636; when not, 4 M. & S. 27; not duly keeping a loaded gun, 5 M. & S. 198; 1 Stark. R. 287.

(f) 41. 1 & 2 Geo. 4, c. 41, s. 1.

(g) 41. 42. When preferable to indict or sue.

(h) 42. C. vii. Not unless it be already a nuisance, 12 Mod. 510; but see 4 M. & S. 73.

(i) 42. C. viii.; 1 Mad. Ch. 157 to 165; 2 Chan. Cas. 110.

(k) 42. C. vii.; 2 Smith, 9.

(l) 42. 9 Coke, R. 55, 58, b.

(m) To abate the nuisance, 3 Bla. C. 220, now

obsolete.

(n) A *sure* remedy to *prostrate*, 3 Bla. C. 221, 222; F. N. B. 124; 5 Coke, 100. Now obsolete.

(o) 42. C. vii.

(p) 42. C. viii.

(q) C. vii.; 2 Salk. 458; 2 Smith, 9. Less care is required than in removing a private nuisance; but see Burn's J. Nuisance, Public, 111.

(r) On his own view, 1 Mod. 76.

(s) 3 Bla. C. 219, 220, note b., Burn's J. Nuisance, V.; 16 East, 196.

(t) 43. Burn's J. Nuisance, 11.; 1 Burr. 333; 5 Esp. R. 217; 2 Car. & P. 485; Peake, 93; 4 Maule & Sel. 272; 8 T. R. 142. Judgment to prostrate.

(u) 6 Geo. 4, c. 78; 4 T. R. 202; Burn's J. Quarantine.

(x) 42. 3 B. & Adolp. 43. Bad flour and bread may be seized, 31 Geo. 2, c. 29, s. 29, 30. Bad meat.

1. Subject-matter.	2. Rights.	3. Injuries and Offences.	4. Remedies and Punishments.
I. THE PERSON.	1. Personal Security.		
1. Own (continued.)	4. Health..... (continued.)	4. Unwholesome food .. (continued.)	1. Compensation. 1. Action on contract.(y) 2. Action on case.(z)
		5. Mala praxis	3. Punishment. 1. Indictment.(a) 2. Penalties.(b)
		6. By sudden alarms, frightening	1. Compensation. 1. Action, contract.(c) 2. Action, case.(d)
	5. Reputatation ..	1. Libels (h)	2. Punishment. 1. By college physicians.(e) 2. Indictment.(f) Indictment, misdemeanor.(g)
		2. Verbal slander (r) ..	1. Prevention. 1. Explanation.(i) 2. Not recriminate.(k) 3. Destroying libel, when.(l) 4. Applying to strike out scandalous matter.(m) 5. Injunction, when.(n)
		1. Slanderous at law	2. Compensation. 1. Action on case.(o)
		2. Slanderous in spiritual court	3. Punishment. 1. Indictment.(p) 2. Criminal information.(q)
			1. Prevention. 1. Explanation.(i) 2. Not recriminate.(k)
			2. Compensation. 1. Action on case.(s)
			3. Punishment. 1. Indictment, when.(t) 2. Summary proceeding.(u)
			Suit in ecclesiastical court.(v)

(y) 42. 1 Rol. Ab. 90, pl. 1; 2 East, 314.

(z) 42.

(a) 42. Bad flour may be seized; punishment of millers for adulterating flour, 31 Geo. 2, c. 29, s. 29, 30; 1 Burn's J. Bread and Mill. Bakers using alum in bread, 3 M. & S. 11. Selling any bad food, 2 East's P. C. 822; 6 East, 133; 1 Burn's J. Bread, 406, note (a); Bad meat, Burn's J. Butcher; 1 Stark. Slander, 143. As to bad butter, see 36 Geo. 3, c. 86, s. 4. If a conspiracy, it is indictable at common law, 2 Ld. Raym. 1179.

(b) 42. Penalty on millers, 31 Geo. 2, c. 29, s. 29, 30. Butcher, bad meat, Burn's J. Butcher; and see *supra*, note (a).

(c) 43. 3 Bla. C. 122, note 10.

(d) 43. *Ibid.*; 2 Wils. 359; 8 East, 348.

(e) 43. Com. Dig. tit. Physician; Via. Ab. tit. Physician.

(f) 43. 40.

(g) 43. Frightening by semblance of ghost, an indictable misdemeanor, 4 Bla. C. 197, 201, note 25; 1 Hale, 429; Smith's Foren. Med. 37 to 39; 1 Paris & Fonb. 351, 352.

(h) 43. Defined, 9 B. & Cres. 172, 403.

(i) Chap. vi. May explain facts and suspend public opinion, and state intent to sue. Defendant's answer when admissible to clear up ambiguity, *Rex v. Tucker*,

R. & M. C. C. 134; Car. C. L.; Burn's J. Threats, II. (k) 44. Must not cross libel, 2 Stark. R. 93.

(l) 44. When may destroy a libel, as a picture, &c. 5 Coke's R. 125, b.; 2 Campb. 511; 2 Bar. & Cres. 311.

(m) 44, note (s). Chit. Eq. Dig. 655; *post*, chap. viii.

(n) Chap. viii. Injunction lies to restrain publication of letters only upon the ground of property, and not directly as to prevent a libel, 2 Swans. 413; 2 Bla. C. 407, note 14; excepting in a pending proceeding, Chit. Eq. Dig. 655.

(o) 44. Hob. 53; 11 Mod. 99.

(p) 44. 5 Coke's R. 125.

(q) 1 Bla. Rep. 294; 5 B. & Ald. 595; Dougl. 284, 387.

(r) 44. What words actionable or not; suggested improvements in remedies, *post*, 23, note (d). *Malice* when essential, 45, 46. *Costs in*, 45.

(s) 45. 3 Bla. C. 123, 125, note 13.

(t) 45. Only for words of a justice in office, 2 Stra. 617; Burn's J. Justices of Peace, VI.

(u) *Post*, 23, note (d).

(v) 45. *Post*, vol. 2. Charge of a spiritual offence, 2 Salk. 692; 2 Stra. 946; 1 Lev. 49. *Aliter*, if temporal slander as well as spiritual, 2 T. R. 473; 3 Bla. C. 123, b., in notes. Must sue in spiritual court within six calendar months, 27 Geo. 3, c. 44.

1. Subject-matter.	2. Rights.	3. Injuries and Offences.	4. Remedies and Punishments.
I. THE PERSON. 1. Own (continued.)	1. Personal security. 5. Reputation (continued.)	2. Verbal slander. (cont.) 3. Malice when essential. (x) 4. Restraints upon reports. (y) 5. When it is preferable to indict or move for criminal information. (z) 3. By malicious prosecution. (a) 4. By threats imputing crime. 1. Menace in writing to impute crime and to extort money, &c. 2. Menace or forcible demand and intent to steal .. 3. Accusation or threat to accuse of infamous crime with intent to extort, and actually extorting, is robbery 4. Duress or threat of a charge of unnatural crime and thereby extorting, is an offence at common law 5. Unsuccessful attempts 1. False imprisonment (g) without legal process	See <i>infra</i> , Injuries to Liberty. (a) Indictment, felony. (b) Indictment, felony. (c) Indictment, felony. (d) Indictment, common law. (e) Indictment, misdemeanor. (f) 1. Prevention. 1. Resistance. (h) 2. Escape. (h) 3. Rescue. (h) 4. Prison breaking. (h) 5. Habeas corpus. (i) 6. Bailing. (k) 2. Compensation. 1. Action, trespass. (l)
	2. Personal liberty		

(x) 45, 46.

(y) 46.

(z) 47.

(a) 47, 48.

(b) 47. 7 & 8 Geo. 4, c. 29, s. 7.

(c) 47. *Ibid.* s. 6.(d) *Ibid.* s. 8.

(e) 47. 6 East, 126; Burn's J. Threats.

(f) 9 Geo. 4, c. 31.

(g) 47. Defined.

(h) 49. Chap. vii. Definition of imprisonment. Il-legal imprisonment is *without process* or under *illegal process*, and may be resisted, or party may escape or be rescued, or even break prison, 5 East, 304; 6 T. R. 236; 1 East's P. C. 310, 325, 329; 1 Leach's C. L. 206; 2 Stra. 1226; Hawk. B. 2, c. 19, s. 1 & 2. But

these are hazardous, and it is always safer to obtain habeas corpus, as *post*, chap. viii. At all events the mode of resistance, escape or rescue, must be proportioned to the necessity, and killing the assailant would at least be manslaughter, *Rex v. Stockley*, 1 East's P. C. 310; *Fost. Ch.* 312; *Rex v. Nestor*, *post*, chap. vii.
(i) 49. 31 Car. 2, c. 2; 56 Geo. 3, c. 100; 1 Cbit. C. L. 118 to 129; 13 East, 195; 2 M. & S. 428; 6 M. & S. 108; 5 B. & Ald. 791; chap. viii.

(k) 49. *Id.* *ibid.*

(l) 49. Lies when illegal imprisonment, not under process, or under void or misapplied process, 6 T. R. 234. *Aliter*, if against magistrate after conviction quashed, 43 Geo. 3, c. 141 s. 1; 5 Taunt. 580; or if process regular, though no crime or no debt, then the action must be *case*, 3 T. R. 185.

1. <i>Subject-matter.</i>	2. <i>Rights.</i>	3. <i>Injuries and Offences.</i>	4. <i>Remedies and Punishments.</i>
I. THE PERSON. 1. Own	2. Personal liberty (continued.)	1. False imprisonment without legal process (continued.) 2. By leaving seamen abroad 3. Malicious prosecu- tion of a regular crim- inal proceeding (p) 4. Malicious arrest or commission of bank- ruptcy	3. Punishment. 1. Indictment.(m) 2. Information.(m) 1. Compensation. Action.(n) 2. Punishment. Indictment, misdemeanor.(o) Information.(o) 1. Prevention. 1. Explanation.(q) 2. Not recriminate.(y) 3. Not resistance or escape, nor rescue nor prison break- ing.(r) 4. Habeas corpus and bail- ing.(s) 2. Compensation. Action on case.(t) 3. Punishment. Indictment.(u) 1. Prevention. 1. Bailing and habeas.(x) 2. Not escape, &c.(y) 2. Compensation. Action on case.(z) Recovery of costs.(a) 3. Indictment. 1. Perjury.(b) 2. Conspiracy.(c)
	3. Burial(d)	Refusal to bury Stealing body	Mandamus.(e) Indictment.(f) Indictment, misdemeanor.(g)

(m) 50. 4 Bla. C. 218, 219; 3 Chit. C. L. 835; or indictment for conspiracy, if several concerned, 2 Burr. 993.

(n) 49. Action on contract, 2 East, 145, or trespass or case, according to circumstances.

(o) 49. An indictable misdemeanor, punishable with imprisonment, 9 Geo. 4, c. 31, s. 30. Indictment or prosecution in name of Attorney-General.

(p) 48. Defined, and distinguished from *false imprisonment*.

(q) *Post*, chap. vi.

(r) 49. Chap. vii. When the imprisonment is *lawful in form*, though the party be innocent, resistance, escape, rescue or prison breaking, are punishable by different statutes, *post*.

(s) 48. Chap. viii. Habeas lies to bring up party to be bailed, when offence bailable.

(t) 48. Action on case lies after acquittal of a prosecution malicious and without probable cause, *Blackford v. Dodd*, 2 B. & Adolp. 179; 3 Bla. C. 126, note 20.

(u) 50. Indictment for conspiracy, 2 Burr. 993; 1 Salk. 174; 1 Stra. 493.

(x) Chap. vii.

(y) 49. If civil process be regular, and party imprisoned were intended to be sued, no escape is legal, though no debt be due, and defendant must put in bail and try the debt, chap. vii.

(z) 50. On proof of malice and want of probable cause, 3 B. & Cres. 139; 1 B. & Adolp. 128; 2 B. & Adolp. 695; 2 Wils. 307; 3 Bla. C. 126, note 20.

(a) 50. 43 Geo. 3, c. 46, s. 3; 4 B. & Cres. 26.

(b) Perjury, false swearing to debt, 1 Peak's C. N. P. 112; 2 Chit. Crim. L. 318 to 330.

(c) 2 Burr. 993.

(d) 50, 51. Rights to, and to a vault or monument in general, *Id. ibid.*

(e) 50, 51. To bury generally, but *not* in a particular manner or place.

(f) 52. For obstructing funeral or stealing body, &c.

(g) 52. 1 Russ. Crim. 415, 2 ed.; *Anatomy Bill*, 2 & 3 Wm. 4, c. 5.

1. Subject-matter.	2. Rights.	3. Injuries and Offences.	4. Remedies and Punishments.
I. THE PERSON.			
2. Relative rights.(h)			
1. Husband & Wife.			
1. Husband.			
1. Wife's person			
	1. Security of person.	1. Her death	1. Prevention. Defence of wife, &c.(i) Justices, lunatic.(k) Securities, peace.(l) Articles, K. B.(l)
	1. Her life		2. No appeal. When action.(m)
			3. Punishment. Indictment, murder.(n) Indictment, manslaughter.(n)
	2. Her limbs	Assaults, battery, &c...	1. Prevention. Resistance and defence.(o)
	3. Her body		2. Compensation. 1. Action by husband.(p) 2. Action by husband and wife.(q)
			3. Punishment as <i>ante</i> , xvii. to xx. Action by husband.(p) Action by husband and wife.(q) Punishment as <i>ante</i> , xx. xxi.
	4. Her health	To her health	Action, case by husband and wife.(q)
	5. Her Reputation	To her reputation	Recaption.(r) Habeas corpus.(s) Action, trespass by husband.(p) Action by husband and wife.(q) Preventive and criminal proceedings as <i>ante</i> , xxii. xxiii.
	2. Security of her liberty	False imprisonment	Recaption.(r) Habeas corpus.(s) Action, trespass.(t) Action, case.(u)
			1. Prevention.(x) 2. Action, trespass.(y) 3. Refusal to maintain.(z) 4. Spontaneous separation.(z) 5. Suit, ecclesiastical court.(a) 6. Divorce.(a)
	3. Her fidelity, society, and assistance	1. Abduction	Suit in ecclesiastical court.(b) Indictment, conspiracy.(c)
		2. Harboursing	
		3. Criminal conversation	Suit for restitution.(d) Action for.(e)
		4. Solicitation, chastity	
		5. Wife withholding conjugal rights	
	4. Her earnings	Withholding	

(h) 53 to 61. Enactment and decisions as to marriages. 56, 57. *Promises to marry*, when binding. 57, 58. *Settlements*. 58. *Deeds of separation* illegal. 59. *Protection of wife, &c.*

(i) 59. 2 Bos. & Pul. 260; 2 Rol. Ab. 546; 3 Bla. C. 3.

(k) 39 & 40 Geo. 3, c. 94, s. 3; 7 Bar. & C. 669; Burn's J. Lunatic.

(l) Burn's J. Surety, Peace.

(m) *Ante*, xvii. note (f); Styles, 347; 1 Lev. 247; Yelv. 89; 1 Ld. Raym. 339. But for temporary loss and expense before death, action lies, 1 Campb. 193.

(n) 9 Geo. 4, c. 31

(o) With force, 2 Rol. Ab. 546; 3 Bla. C. 3.

(p) *Per quod consortium*, &c. 3 Bla. C. 140.

(q) For injury to her, 3 Bla. C. 140.

(r) 3 Inst. 134; Hal. Anal. 46; 3 Bla. C. 4.

(s) *Post*, chap. viii.

(t) Fitz. N. B. 89; 3 Bla. C. 139, note 27.

(u) 59. After demand, Willes, 578 to 580; 6 T. R. 221; 3 Bla. C. 139, note 27.

(v) If person killed in act of adultery, it is only manslaughter, 1 Hale, 486; T. Raym. 212.

(y) 2 M. & S. 436; 2 New R. 482; but *semble* may be in case, 6 East, 251, 387. And should be so if a count for harbouring will be material.

(z) Stra. 647, 706; 1 B. & Adolp. 227; 1 Lev. 4; 7 T. R. 603.

(a) 59. 1 Bla. C. 441; 1 Ought. 317; 11 Ves. jun. 536.

(b) 59. 1 T. R. 6; 3 Bla. C. 64, 65.

(c) 59. 3 Stat. Trials, 519; Burn's J. Conspiracy, I.

(d) 59. 3 Bla. C. 94.

(e) 2 Bla. R. 1237, 1239; 1 Salk. 114; 9 East, 472.

1. Subject-matter.	2. Rights.	3. Injuries and Offences.	4. Remedies and Punishments.
I. THE PERSON. II. Relative rights. II. Rights of wife	1. Her own person 1. Of her personal security 1. Life. 2. Limbs. 3. Body. 4. Health. 5. Reputation.	Same injuries as to any other individual	1. Same remedies against third persons. 1. May kill assailant to prevent rape. (<i>f</i>) 2. Wife cannot sue alone. (<i>g</i>) 3. When otherwise in equity. (<i>h</i>) 4. When may sue in husband's name (<i>i</i>) 2. Remedies against husband. 1. Articles of peace. (<i>k</i>) 2. Suit in ecclesiastical court. (<i>l</i>) 3. Bill in equity. (<i>m</i>) 4. Divorce. (<i>n</i>) 5. Indictment. (<i>o</i>) Habeas Corpus. (<i>p</i>)
	2. Personal liberty 2 & 3. Person of husband, and to conjugal rights	Imprisonment 1. Subtraction of conjugal rights 2. Adultery 3. Homicide	Her suit in ecclesiastical court for restitution or divorce. (<i>q</i>) Her suit for divorce. (<i>r</i>) Prevention. (<i>s</i>) Defence of husband. (<i>s</i>) No appeal or action, and when compensation. (<i>t</i>) Indictment. (<i>u</i>) Remedies. 1. Purchasing necessities. (<i>y</i>) 2. Suit for alimony. (<i>z</i>) 3. Action by trustee. (<i>a</i>) 4. Order of justice. (<i>b</i>)
	4. To maintenance. (<i>x</i>)	Refusal of	1. Suit in equity. (<i>d</i>) 2. Habeas corpus. (<i>e</i>) 3. Appointments. (<i>f</i>)
	5. To her property (<i>c</i>)	Withholding	

(*f*) 33, 39, 59, note (*c*). 1 Hale, 485.

(*g*) 8 T. R. 545; 2 B. & Cres. 555; 3 B. & Cres. 291.

(*h*) Chit. Eq. Dig. 497.

(*i*) 9 East, 471.

(*k*) 60. In equity, 1 Jac. & W. 348; at law, 3 Campb. 326; 1 P. Wms. 482; 1 M'Clell. & Y. 269.

(*l*) 60. 1 Jac. & W. 348.

(*m*) Court of equity will only bind husband to good behaviour, not remove wife from him, Ambler 334; 2 Ves. 578.

(*n*) 59, note (*m*), 60. Divorce, 11 Ves. J. 536.*

(*o*) Indictment at common law for battery, &c., wife a witness against husband, 1 Stra. 633; 1 East's P. C. 455; Burn's J. Evidence, IV. s. 4.

(*p*) 60. 13 East. 173; when not, 1 Chit. R. 674; 1 Jac. & W. 94; Prec. Ch. 492.

(*q*) 3 Bla. C. 94; Phil. Ec. C.

(*r*) 3 Bla. C. 94, note (14).

(*s*) With force, 2 Rol. Ab. 546; 3 Bla. C. 3, note 2; ante, xvii., note (*u*).

(*t*) Appeal, when may, 59 Geo. 3, c. 45. Compensation to widows in some cases, 7 Geo. 4, c. 64, s. 30, and ante, xvii., note (*g*).

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(*u*) Ante, xvii., notes (*h*), (*i*), (*k*).

(*z*) Forfeited by adultery, 5 B. & Adol. 227; so dower: but *seuple* not jointure, 2 B. & Cres. 547; 1 Taunt. 417; 8 Bing. 256.

(*y*) 60. 1 Salk. 118; 2 Ld. Raym. 1006; 2 Stra. 1214; 3 Taunt. 421. *Aliter*, if wife voluntarily leave husband and tradesman has notice, 2 Stra. 1214; 2 Stark. R. 87; or wife guilty of adultery, 1 B. & Adol. 227.

(*z*) 60. 1 Bla. C. 441; 3 Bla. C. 94; 1 B. & Adol. 60, 61; 3 Bing. 550.

(*a*) 58, 59, 60. But *seuple*, not on deed of separation, which is void. 58. *Westmeath v. Westmeath*, 1 Dow's Rep. New S 519.

(*b*) 60. 5 Geo. 4, c. 83, s. 3, but not if wife guilty of adultery, 1 B. & Adol. 227.

(*c*) 61. How far a wife may be liable on her contract.

(*d*) 61. When and how a wife may have separate property and sue in equity.

(*e*) 60. When wife may have a habeas corpus to enable her to dispose of her separate property.

(*f*) 63. 365. How a wife may appoint, devise, or surrender her copyhold, &c.

1. Subject-matter.	2. Rights.	3. Injuries and Offences.	4. Remedies and Punishments.
I. THE PERSON.			
II. Relative rights.			
2. Parent & child.			
1. Parent's right (continued.)	2. To services of child (continued.)	5. Solicitation chastity	Suit, ecclesiastical. (f)
	3. To obedience, and to educate child	Disobedience	Indictment, conspiracy. (g)
	4. To earnings of child .	Nonpayment of	Information, K. B. (h)
	5. To controul marriage of infant child or ward	Disobedience	Correction. (i)
			Bill, equity. (k)
III. Rights of child			
II. Rights of child	1. To his own personal security	Same injuries as any other individual	Bill to restrain parent. (l)
	2. To person of parent.	Homicide, battery, &c. (p)	Action. (m)
	3. His own maintenance	Withholding	Bill in equity. (n)
	4. Education, when or not compelled (r) ..	Improper education (r) ..	
	5. His own property (y)	Securing same	
III. Guardian and ward.			
1. Guardian's right	Same rights as parent. (a)		
	1. In person of ward (u)	Abduction of	Defence. (q)
	1. In education and controul	Disobedience	No action unless contract. (r)
	2. In marriage of	Marrying without consent of guardian	By bill in equity. (s)
			By justices. (t)
			Indictment. (u)
			Bill, equity. (x)
			Bill in equity. (z)
			1. Preveption. (b)
			2. Stopping elopement. (b)
			3. Habeas corpus. (c)
			4. Indictment. (d)
			Chancellor's interference. (e)
			Information. (f)
			Indictment. (f)
			Imprisonment, contempt. (g)

(f) 63.

(g) 3 State Tr. 519. Burn's J. Conspiracy, I.

(h) Id. Ibid.

(i) 64. Hawk. P. C. 130; 1 Bla. C. 452. Must be moderate, 10 Ves. 58, 6.

(k) 64, 68, 69, note (y). To compel son to continue at a particular university, 1 Stra. 167; 3 Atk. 721; 3 P. Wms. 51.

(l) 64, 65. 2 Russ. R. 1; 2 Bligh's Rep. New S. 124; 1 Dow, New S. 154.

(m) Parent's right is only to earnings from labour, and not to any other property, 3 B. & Ald. 548; 2 Car. & P. 578; 1 Bla. C. 452, 453. Parent not entitled to infant's property except for maintenance of child when parent unable, Chit. Eq. Dig. 733. See post, Guardian and Ward.

(n) 63. Only when a ward of chancery, 2 Atk. 535, 539. See Indictment for Conspiracy, &c. ante, xxvi., note (u); Guardian and Ward, Chit. Eq. Dig. 736. See as to consent of parents, post, 53 to 55.

(o) Ante, xvii., to xx., and notes; Chit. Eq. Dig. 739.

(p) Ante, xvii., &c.

(q) 63. Defence with force but no action, 2 Rol. Ab. 546; 3 Bla. C. 3, 4, 142, 143.

(r) 63. 4 East, 84; 5 Esp. R. 131; 1 Car. & P. 1, 5; 2 Car. & P. 82; 7 Dowl. & R. 612. How to

secure property for infant's benefit, 65, 66.

(s) 3 Atk. 60; Chit. Eq. Dig. 730, 733.

(t) 43. Eliz. c. 2, s. 7; 7 Jac. 1, c. 4, s. 8; 59 Geo. 3, c. 12, s. 31, 32; 5 Geo. 4, c. 83, s. 3; 4 Burn's J. Poor,

(u) 65, 68. Starving child of tender years, Russ. C. C. 20; 2 Campb. 650. post, 34.

(x) 1 Bla. C. 450, 451; 10 Ves. 57.

(y) 63. By gift from father when old enough, 2 Car. & P. 578; 3 Bla. 453. Other property, note (h).

(z) 1 Bla. C. 462, note 11; 1 P. Wms. 702; 2 P. Wms. 117; 4 Bro. C. C. 101, 102; 2 Fonbl. 5th edit. 232; 11 Ves. jun.; 2 Bligh, N. S. 124.

(a) 69, 70. Father's power to appoint guardian under 12 Car. 2, c. 24. In general, guardian has same powers as parent during guardianship, 1 Bla. C. 460 to 467, and notes; and whilst funds in court, 70; 2 Sim. & Sta. 123.

(b) 69. May stop clothes of ward to prevent elopement, 1 Car. & P. 101.

(c) 63. Note (l), *semitic*.

(d) If by conspiracy, 1 East's P. C. 459.

(e) 69. Ibid. note.

(f) 69, note (a). If by conspiracy, indictable at common law, 1 East's P. C. 459; 1 Bla. C. 462 to 467.

(g) 69. Notes (b), (c), (d), (e), 3 P. Wms. 116;

1. Subject-matter.	2. Rights.	3. Injuries and Offences.	4. Remedies and Punishments.
I. THE PERSON.			
II. Relative rights.			
III. Guardian and ward.			
1. Guardian's right (continued.)	3. In ward's personalty.....	Injuries to	Bill, equity. (h)
	4. In ward's realty	Injuries to	Bill, equity. (i)
2. Ward's rights	1. To his own person.		
	1. Liberty and society.....	1. Injuries same as to others	Same as <i>ante</i> , xvii. to xx.
		2. By guardian	Equity, removal. (k)
			Equity, controul over. (l)
			Remedy for society. (m)
	2. Maintenance ..	Withholding	Bill, equity. (n)
	2. To his personalty ..	Withholding	Bill, equity. (o)
	3. To his realty	Withholding	Bill, equity (u)
IV. Master and apprentice. (p)			
1. Master's rights	1. In person of apprentice	Battery.....	1. Prevention.
		Other injuries (q).....	1. Defence of. (r)
			2. Compensation.
			Action, trespass <i>per quod</i> . (s)
			3. Punishment.
			1. Justices. (t)
			2. Indictment. (u)
	2. In services of	Abduction	Recaption. (x)
		Harbouring	Habeas corpus, when not. (y)
			Chief justice's warrant. (z)
			Justice's warrant. (a)
			Justices. (b)
		Absenting	Trespass <i>per quod</i> . (c)
			Action, case. (c)
			Indictment, when. (d)
		Breach of indenture....	Action, covenant. (e)
		Debauching daughter <i>per quod</i>	Action <i>per quod</i> . (f)
		Disobedience	Correction. (g)
	3. In obedience of		Justices. (h)

5 Ves. 15; 6 Ves. 572; 16 Ves. 259; may be imprisoned in Fleet, 8 Ves. 74; how to clear contempt by making proper settlement, 1 Ves. jun. 154; but not of course, 8 Ves. 74; nor appearance by attorney allowed, 4 Ves. 386.

(h) 69, 70. 1 Bla. C. 463 to 466; how to obtain proportion for maintenance of infant, 69, 70.

(i) Id. Ibid.

(k) 69. When guardian removable, 1 Bla. C. 462, note 8. When not, id. note 11; 2 P. Wms. 561.

(l) 69, 70. Id. ibid. 1 Bla. C. 463, note; Chit. Eq. Dig. 729, 730; 2 Chan. Rep. 237; 2 Lev. 128; 1 P. Wms. 704, 705; 3 Bro. P. C. 341.

(m) 2 Chan. Rep. 237; 2 Lev. 128; 1 Bla. C. 463, note (g).

(n) 70. When or not may be obtained on petition without bill; and see p. 68; 1 Bla. C. 463, note; 3 Bro. C. C. 88, 387; 4 Id. 101; 12 Ves. 492; 4 Ves. 362; 11 Ves. 1; 2 P. Wms. 117.

(o) 1 Blac. 462 to 467.

(p) 70 to 72. Suggested stipulations.

(q) See "Child," *ante*, xxvi.

(r) 70. With force, 2 Rol. Ab. 546.

(s) 70.

(t) See case of common assaults and battery, 9 Geo. 4, c. 31.

(u) Indictment at common law.

(x) 70. 3 Inst. 134; *post*, c. vii.

(y) 70. Statute 31 Car. 2, c. 2; 56 Geo. 3, c. 100⁵ only on behalf of apprentice, 6 T. R. 497; 5 East. 38; 7 T. R. 745; *post*, c. viii.

(z) 70, 71. May be issued on application of master, when, 7 T. R. 745; 1 Leach, C. L. 233; *post*, c. viii.

(a) 73. Particular acts relating to apprentices, Burn's J. Apprentice, 183 to 193. Justice's warrant to apprehend apprentice, 5 Eliz. c. 4, s. 47; 7 T. R. 745; stat. 6 Geo. 3, c. 25, compels apprentice to serve out his absent time. 16 East, 13.

(b) 73. Burn's J. Apprentice.

(c) Trespass only when taken by force, 1 Salk. 380; 3 Salk. 391. *Case*, when preferable, 1 Salk. 68; 4 Moore, 12; 6 T. R. 652; 7 T. R. 310, 314.

(d) 6 Mod. 182; Burn's J. Apprentice, VI. (5), *ultra*, if conspiracy, 2 Stark. R. 489.

(e) Dougl. 518; Cro. Car. 179; 3 B. & A. 59; 6 B. & Cres. 686.

(f) 70. Case or trespass, 3 Wils. 18; 2 New R. 476; 2 T. R. 176; 6 East, 577.

(g) 71. By master, 1 B. & Cres. 469; Cro. Car. 179; 2 Shower, 289; 1 Bla. C. 428; F. N. B. ; Burn's J. Apprentice, VI. (6), (7); Correction by Justices, Burn's J. Apprentice; but master must not delegate, 9 Coke, 76.

(h) 71. Burn's J. Apprentice. When may discharge apprentice, 71, note (g).

1. Subject-matter.	2. Rights.	3. Injuries and Offences.	4. Remedies and Punishments.
I. THE PERSON.			
II. Relative rights.			
IV. Master and apprentice.			
1. Master's rights . . .	4. His personal earnings	Withholding	Action for. (i)
2. Rights of apprentice	1. In person of master	Battery, &c.	Defence of. (k)
(continued.)	2. Maintenance	Withholding of	Justices. (l)
			Action, indenture. (m)
			Indictment, when. (n)
			Indictment. (o)
			Magistrate. (p)
			Action, indenture. (q)
			Magistrates. (r)
			Equity suit. (s)
V. Master and servant or clerk (t)			
1. Right of master . . .	3. Care and treatment . .	Cruelty	
	Instruction	Withholding	
	Return premium . .	Withholding	
	1. To person of servant	Homicide	1. Prevention. (u)
			2. No action. (x)
			3. Punishment, indictment. (y)
	2. To services of	1. Injuries by third person with force; as	
		1. Menace	1. Prevention. (z)
		2. Assault.	1. Defence of. (z)
		3. Battery.	2. Compensation.
		4. Wounding.	1. Action, trespass. (a)
		5. Mayhem.	3. Punishment.
		6. Imprisonment.	1. Justices, summary proceedings. (b)
		7. Assault on seamen and servants in trade.	2. Justices, common assaults (c)
			3. Indictment, special assaults. (d)
		2. Injuries without force.	
		1. Abduction	1. Recaption. (e)
		2. Harbouring	2. Habeas corpus. (f)
			3. Action. (g)
			4. Punishment. (h)
			Indictment, conspiracy. (h)

(i) 71. When master may sue in *assumpsit* or case, 1 Taunt. 112; 3 M. & S. 191; 4 Taunt. 876.

(k) 71. With force, Rol. Ab. 546.

(l) 71. 34, 35, 43. 20 Geo. 2, c. 19; 4 Geo. 4, c. 29; Burn's J. Apprentice, VI. (7), IX. p. 183 to 193.

(m) 71. Burn's J. Apprentice, VI. (2), (3), (7).

(n) 71. 34, 35, 43. 2 Campb. 650; Russ. & R. C. C. 20; 1 Russ. 16. Not against a married woman for neglecting to provide proper food, 72, note (h).

(o) 71, 72. 34, 35, 43.

(p) 71. *Supra*, note (b).

(q) 71. Burn's J. Apprentice, VI. Though apprentice absent himself, master must continue to instruct him on his return, 1 B. & Cres. 460. 2 Dowl. & R. 465.

(r) 71.

(s) 71, note (g).

(t) See *Rights* in general, 72 to 83; *Liabilities* of Master, 79, 80.

(u) 79. Prevention by any one, 2 Bos. & Pul. 260. Master may defend with force, 79, n. (l).

(v) 79. No action *per quod*, Styles, 347; 1 Lev. 247; Yelv. 89; 1 Ld. Raym. 339. *Sed quare* for temporary loss of service; where *manslaughter*, 1 Camp. 193.

(y) 9 Geo. 4, c. 31.

(z) 79. With force, 2 Rol. Ab. 546, D. pl. 2; Owen, 151; Lofft, 215; 1 Hale, 484; Hawk. B. 2,

c. 60, s. 24; Rac. Ab. Master and Servant, P.; 1 Bla. C. 429; 3 Bla. C. 3; 1 Burn's J. 270; 5 Burn's J. 428; denying, 1 Salk. 407; 1 Ld. Raym. 62; Bul. N. P. 18.

(a) 79. Action must be *per quod*, but he must be a servant, not a performer at a theatre, 1 Esp. R. 386.

(b) 74. Menacing journeymen, workmen, and servants in trade, 15 Geo. 4, c. 96; 6 Geo. 4, c. 129, s. 3. Imprisonment, three calendar months, 5 Burn's J. Servants, 423.

(c) 74. Journeymen in trade, common assault, 9 Geo. 4, c. 31, s. 27, or indictment at common law.

(d) 74. 9 Geo. 4, c. 31, s. 16 & 26; Burn's J. Servants.

(e) 8 Inst. 134; 3 Bla. C. 4; 1 Bla. C. 428, note 13; what master may do after recaption.

(f) *Semble*, not unless on application of servant impressed, &c. 70, notes (t), (u).

(g) 79, note (y). Action case, or if an illegal entry to house, *trespass*. 79, note (c). Or if contrary to indenture, action of *covenant* thereon. Where an abduction has been by force, then *trespass* is best form of proceeding, 1 Salk. 380; but *case* for enticing and harbouring is in general preferable, F. N. B. 167; Winch. 51; 2 Lev. 63; 1 Lev. 240; 6 T. R. 221; Cowp. 54; 2 Bar. & C. 448. Action may be against servant or third person, but not both, 3 Burr. 1345.

(h) 79. 2 Stark. R. 489.

1. Subject-matter.	2. Rights.	3. Injuries and Offences.	4. Remedies and Punishments.
I. THE PERSON. II. Relative rights. V. Master and servant or clerk. 1. Right of master <i>(continued.)</i>	2. To services of. <i>(continued.)</i>	3. Debauching female servant.... 4. Solicitation chastity 5. Solicitation to rob, &c. 3. Misconduct by servant. <i>(m)</i> 1. & 2. Servants in husbandry or trades 3. Misconduct of menial servants 4. Misconduct of clerks <i>(t)</i>	Action <i>per quod</i> . <i>(i)</i> Trespass, when. <i>(i)</i> Suit in ecclesiastical court. <i>(k)</i> Indictment, misdemeanor. <i>(l)</i> Discharge. <i>(n)</i> Not correction. <i>(o)</i> Arbitration. <i>(p)</i> Justices. <i>(q)</i> Action. <i>(r)</i> Indictment. <i>(s)</i> Discharge. <i>(u)</i> Not correction. <i>(x)</i> Action, covenant. <i>(y)</i> Action, case. <i>(z)</i> Same as any individual, <i>ante</i> , xvii. May depart. <i>(h)</i> Action, trespass. Indictment, 9 Geo. 4, c. 31, s. 30. Prevention. <i>(c)</i> But no action. <i>(d)</i>
2. Right of servant. <i>(a)</i> ..	1. Servant's own person 2. In person of master..	1. Same injuries 2. By master, battery .. 3. Leaving seamen abroad Battery of master.....	

(i) 79, note *(b)*. Case or trespass, if an illegal entry to house, 2 T. R. 166.

(k) Burn's Ecc. L.

(l) 2 East, 5, 17; 6 East, 141, 464. Any attempt or solicitation to commit a felony or indictable misdemeanor, although unsuccessful, is indictable as a misdemeanor at common law, *Id*, *ibid.*; 4 Harg. Stat. Tri. 759; Russ. & R. C. C. 107.

(m) 72 to 83. Rights and duties in general of servants in husbandry, menial servants and clerks; and see 1 Bla. C. 424, 425; 3 Bla. C. 428; Burn's J. Servants.

(n) 75 to 78. For what misconduct and when servant has no right to clothes, 75, note *(m)*.

(o) 73, 75. Must not correct servant in husbandry or trade, or menial servant, 1 Bar. & C. 469. What correction of a sailor or soldier allowed, 73, 74. Liability of captain of a ship for excess in correction, 3 Campb. 42; 1 Stra. 695; 2 Stra. 944; 2 Car. & P. 148; Bul. N. P. 19.

(p) 72, 76. 5 Geo. 4, c. 96, to what labourers.

(q) 72 to 74. When or not justices have jurisdiction, 20 Geo. 2, c. 19; 4 Geo. 4, c. 34; 9 Bar. & C. 603, 628. Combinations of servants in trade, 6 Geo. 4, c. 129; 9 Geo. 4, c. 31, s. 25: Justices have no juris-

diction over menial servants.

(r) Action on express or implied contract.

(s) 74. Assaults to raise wages indictable, 9 Geo. 4, c. 31, s. 25. Indictment for conspiracy to raise wages at common law. The 5 Geo. 4, c. 96, and 6 Geo. 4, c. 129, repealed statute of punishments against conspiracies, and only punish violence, threats, or intimidations.

(t) 80 to 83. Duties and rights of. 80, 81. Covenants by, 6 Bing. 354, 82. Offences of larceny, embezzlement, &c. 82, 83. Liability of a surety, and precautions to be observed by him, 2 Vern. 518; Chit. Eq. Dig. 264.

(u) 81. For what cause may discharge.

(x) 73 to 75.

(y) 6 Bing. 354.

(z) Action on case.

(a) 72. When he acquires a settlement. 72. When may stipulate against it, 6 Bing. 163. 82. Right to solicit customers.

(b) Fit. N. B. 168; Bro. Labourer, 51; Trespass, 349; 1 Bla. C. 428.

(c) 2 Rol. Ab. 546.

(d) 3 Bla. C. 142, 143.

1. Subject-matter.	2. Rights.	3. Injuries and Offences.	4. Remedies and Punishments.
I. THE PERSON. II. Relative rights. V. Master and servant or clerk. 2. Right of servant (continued.)	3. To maintenance, &c. 4. Not to medical care. (h) 5. Not to clothes.(i) 6. Right to wages 7. As to character(m) . .	Withholding Withholding of. 1. Menial servant 2. Other servants . . False character. 1. False bad character. 1. Libel 2. Verbal 2. False good character	Departure.(e) Action.(f) Indictment.(g) Action.(k) Justices.(l) Action.(m) Action.(m) Penalty, 32 Geo. 3, c. 56. Action on case.(m)
II. PERSONAL PROPERTY.(n) . .	1. Tangible property. 1. In actual possession	1. Illegal takings. 1. Not criminal . .	1. Prevention. 1. Resistance.(o) 2. Stoppage in transitu.(p) 3. Recaption.(q) 4. Seizing of game.(r) 5. Replevin, action of.(s) 6. Detinue.(t) 7. Bill in equity.(u) 2. Compensation, damages. 1. Action, trover.(x) 2. Action, trespass.(y) 3. Justices, summary.(z)

(e) 3 Bla. C. 142, 143.

(f) On contract express or implied.

(g) 84. Indictment, when servant of tender years starved or ill used, 2 Camp. 650; Russ. & R. C. 20; 1 Leach, 137; 1 Bla. C. 428, note 13.

(h) 77, n. (c). 3 Bos. & Pul. 247; Cald. 527; 4 Burn's J. Poor, 26 ed., 239. *Aliter*, if contract.

(i) 75, n. (m).

(k) 78. When recoverable, 1 Bla. C. 425, notes 5, 6, 428, note 16; 5 Bing. 135. When forfeited, 2 Stark. R. 256; Burn's J. tit. Servants, III.

(l) 72, 77, 78. When entitled, Burn's J. Servant, IV.; 4 Geo. 4, c. 34; 5 Geo. 4, c. 95; 6 Geo. 4, c. 129. And when justices can act, Burn's J. Servants, IV.; 9 Bar. & C. 603, 608.

(m) 78, 79. No action lies for refusal to give character, 3 Esp. R. 201. *Aliter*, for maliciously giving a false bad character, 3 Bos. & Pul. 587; 8 Bar. & C. 578. Liability for giving a false favourable character, 32 Geo. 3, c. 56; also action at common law, Burn's J. Servants, XXXI.; *Foster v. Charles*, 6 Bing. 396; 7 Bing. 105.

(n) 84 to 145. I. The nature of personality, and several kinds are stated and divided into those, First, Tangible and in possession, such as, 1. Animals, birds, and fish; 2. Moveables and ships; 3. Growing plants and emblements; 4. Fixtures; 5. Things mixed of realty and personality; 6. Stock and funds; 7. Se-

curities; Secondly, Things in possession but not tangible, such as copyrights; Thirdly, Choses in action.

II. Then is considered the extent of interest. III. Time of enjoyment. IV. Number of owners. V. Modes of acquiring titles, of which fourteen are enumerated. VI. Contracts are considered in general and in particular as regards Sales and Guarantees. Then from page 130 to 149, injuries, and offences, and remedies, and punishments, are considered, and are stated in the above Analysis.

For the particular civil and criminal injuries or offences, as they vary according to the nature of the thing, see the enumeration of each in pages 84 to 145; the above Analysis only states the general rules.

(o) 130, 131. Resistance by force, but not using a dangerous instrument, Id. note (y), post, chap. vii.

(p) 131, note (b). Stoppage in transitu.

(q) 130. Recaption with force, 1 B. & C. 514; 8 B. & C. 269; 9 B. & C. 59, 60; 7 Bing. 661. When illegal to enter another's land to retake, 8 Bing. 186; post, chap. vii.

(r) 131, note (k). Seizure, game. 405, 406.

(s) 131, note (d). Replevin.

(t) 131, note (c). Detinue.

(u) 131, note (f). Specific delivery of chattel.

(x) 131, note (g). Trover.

(y) 131, note (h). Trespass.

(z) 131, n. (i). 7 & 8 Geo. 4, c. 29, and c. 30, s. 24.

1. Subject-matter.	2. Rights.	3. Injuries and Offences.	4. Remedies and Punishments.
II. PERSONAL PROPERTY..... (continued.)	1. Tangible property. 1. In actual possession (continued.)	2. Criminal takings (a) 1. Feloniously	1. Prevention. 1. Resistance.(b) 2. Recaption.(c) 3. Search warrant. 2. Compensation. 1. Justices, summary.(d) 2. Restit. after conviction.(c) 3. Action, when.(e) 3. Punishment. 1. Summary.(d) 2. Indictment.(f)
		2. Embezzlements	Recaption.(g) Action.(h)
		3. False pretences	Indictment.(i) Recaption.(k) Action.(l) Indictment.(m)
		4. Threats. 1. Extorting money by threats or duress	Indictment, misdemeanor. (n)
		2. Assaults with intent to rob...	Indictment, felony. (o)
		3. Menaces or forcible demand with intent to steal	Indictment, felony. (p)

(a) 130 to 132. What not a felonious taking, *Re v. Alexander*, Burn's J. Horses, 1.

(b) 132. What resistance, see chap. vii.

(c) 132, chap. vii. *Recaption after felonious taking*; when may *retake*, 3 Bla. C. 4, note 3. May *retake* thing stolen, *unless* duly sold in *market overt*, 2 Bla. C. 449, 450; *Burn's J. Hoises*, II.* Pawnbroker's shop not a *market overt*, and *trover* always lies against pawnbroker after demand, 2 Stra. 1187; 1 Stark, R. 472; 2 Campb. 336; 1 Wils. 8. If sale in *market overt*, still after conviction the owner is entitled to *retake* or recover from person then in possession, 2 T. R. 780; and 7 & 8 Geo. 4, c. 29, s. 51, directs award of *restitution*, unless bill of exchange or note *bond fide* negotiated. *Horses*, particular law, 2 & 3 Ph. & M. c. 7; 31 Eliz. c. 12. If no sale in *market overt*, owner may *retake*, s. 5; *Burn's J. Hoises*, II.; 2 Bla. C. 451. Not after *regular* sale, the original owner cannot maintain *trover* till after conviction, 2 Car. & P. 41, 43. Must not advertise reward for return, 7 & 8 Geo. 4, c. 29, s. 59.

(d) 133. *Justices' SUMMARY interference* in case of felonious taking, is confined to horses, 2 & 3 Ph. & M. c. 7; 31 Eliz. c. 12; Burn's J. Horses, II.; and to horses stolen, and not when obtained by false pretences, 2 Stark. R. 76. Does not extend to other chattels whereof felony has been committed, see 7 & 8 Geo. 4, c. 29. As to hares and rabbits, dogs, confined beasts or birds, pigeons, fish, certain trees and shrubs, underwood, fences, posts and rails, fruit, roots, &c. not larceny; but justices have jurisdiction, Id. s. 30.

(e) 133. *Action in general, in case of felony, not allowed till after prosecution*, 2 T. R. 750; 2 Car. & P. 41, 43. In case of *horses* may sue in detinue or replevin, unless sale in market overt, 2 & 3 Ph. & M. c. 7, s. 5. So action not taken away if will or writings stolen, 7 & 8 Geo. 4, c. 29, s. 24. 133, 134. *Criminal embezzlements* do not take away action, *Id.* s. 52.

(f) 131. *Indictment, larceny*, 7 & 8 Geo. 4, c. 29; *Burn's J. Larceny*. Particular animals and chattels, particular provisions, *Id. ibid.* 84 to 101.

(g) 130, 133. *Recaption, post*, chap. vii.

(h) 133. Action expressly reserved by 7 & 8 Geo. 4, c. 29, s. 52.

(i) 133, 134. *Indictment*, 7 & 8 Geo. 4, c. 29, s. 46 to 52.

(k) 130, 131, 134, *post*, chap. vii *Reception*; no property passes in goods obtained by false pretences, and they may be rescued or retaken, 1 Bar. & C. 514; 2 Dowl. & R. 755; 7 Taunt. 59.

(l) 134. *Action of trover or case, or assumpsit against deceiver*, 1 Stark. R. 20; but if credit be not expired, then in *case*, 9 Bar. & C. 59.

(m) Indictment on 7 & 8 Geo. 4, c. 29, s. 53; Burn's J. Cheat. Even against a minor pretending to be of age, *ld. l.* For obtaining enlisting money, 10 Geo. 4, c. 6. At common law for *conspiracy*, 3 T. R. 98; 5 Dowl. & R. 611; not otherwise, 1 Stark. R. 402.

(n) 134. At common law, *Burn's J. Threats*.

(v) 134. 7 & 8 Geo 4, c. 29, s. 6.

(μ) 134. Ibid.

1. Subject-matter.	2. Rights.	3. Injuries and Offences.	4. Remedies and Punishments.
II. PERSONAL PROPERTY. 1. Tangible property . . . <i>(continued.)</i>	1. In actual possession . . <i>(continued.)</i>	4. Threats <i>(continued.)</i> 4. Any menace or threat to impute infamous crime with intent to extort . . 5. Letter or writing, demanding with menaces any chattel or to accuse with intent to steal . 6. Threat to destroy corn, hay, or straw 2. Illegal detentions. 1. Civil 2. Criminal embezzlements 3. Damaging. 1. When not criminal. (c) 1. Injuries by bailees 2. By others. Malfeasance Misfeasance Negligence 2. When criminal or malicious. (g) 1. In general, in nature of felony 2. Malicious, various acts	Indictment, felony. (q) Indictment, felony. (r) Indictment, felony. (s) Recaption. (t) Replevin, action. (u) Detinue, action. (x) Trover, action. (y) Bill in equity. (z) Seizure, heriot. (a) Seizure for tolls. (b) Remedies, ante, xxxii. Case, action of. (d) Action on contract. (d) Trespass. (e) Case. (e) Case. (f) Indictment, or summarily before justices. (h) Indictment, or justices summarily. (i) Action against hundred. (k)

(q) 134. 7 & 8 Geo. 4, c. 29, s. 7.

(r) 134. Ibid. s. 8.

(s) 135. 4 Geo. 4, c. 54, s. 3.

(t) 135. *Recaption*, 1 B. & Cres. 514; 7 T. R. 59. When cannot enter stranger's land to retake, 8 Bing. 186; 1 B. & Adol. 394; *post*, *Recaption*, c. vii.(u) 135. *Replevin*, 1 Chit. Pl. 188; 2 Stark. 288.(x) 135. *Detinue*, 1 Chit. Pl. 139.

(y) 135. 3 Bla. C. 152; 1 Chit. Pl. 176.

(z) 135. Bill lies to restore specific chattel, *post*, c. x.

(a) 135. 2 Saund. 168, note I.; 3 Bla. C. 15.

(b) 135. *Post*, c. vii.

(c) 136, 136.

(d) 135. Against *bailees* case or *assumpsit*, 1 Chit. Pl. 153 to 159.

Pl. 153 to 159.

(e) 135. Against *third persons*, trespass or case, according to the nature of the injury, whether *direct* or only *consequential*, and whether the chattel was in possession of an owner or a *third person*, 1 Chit. Pl. 193 to 200. If consequential only, as firing near a decoy, *case*, 2 B. & Cres. 934; 11 East, 571.(f) 135. Case for mere *negligence* or *nonfeasance* or the consequences of a public nuisance, 1 Chit. Pl. 153 to 159; 3 Bla. C. 153, 154.

(g) 136, 137.

(h) 136. 7 & Geo. 4, c. 29; Burn's J. Larceny.

(i) 136, 137. Ibid. c. 30; Burn's J. Malicious Injuries.

(k) 137. Ibid. c. 31; action against hundred where furniture, &c. destroyed with building.

1. Subject-matter.	2. Rights.	3. Injuries and Offences.	4. Remedies and Punishments.
II. PERSONAL PROPERTY.			
1. Tangible property. (continued.)	1. In actual possession. (continued.)	3. Damaging (continued.)	
		3. Petty malicious injuries not exceeding 5 <i>l.</i>	Justices summarily. (l)
		4. Cruelty to animals.	Justices summarily. (m)
		5. Poisoning game or eggs, &c.	Justices summarily. (n)
		6. Slaughtering Horses.	Justices summarily. (o)
		7. Injury, British plate glass.	Indictment, felony. (p)
		8. Injuries, English linen company.	Indictment, felony. (q)
		9. Conspiracy.	Indictment. (r)
		10. Threats to destroy corn, grain, hay, or straw.	Action. (s) Indictment. (t)
	2. Rights to, but without actual possession. (u)	Same injuries.	Same remedies. (u)
	3. Rights in remainder or reversion. (x)	Same injuries. (x)	Prevention. (y) Justices. (z) Indictment. (a) Case. (x) Bill in equity. (b)
	4. Right in joint tenancy, &c. (c)	Same injuries.	Same remedies. (c)
2. Not tangible. (d)	In possession, or in remainder or reversion.		
1. Copyright in books & music. (e)			
2. Busts and sculptures. (f)			

(l) 137. Justices summarily, 7 & 8 Geo. 4, c. 30, s. 24; Burn's J. Malicious Injuries.

(m) 137. 3 Geo. 4, c. 71; Burn's J. Cattle.

(n) 137. 1 & 2 W. 4, c. 32, s. 3, 24. *Poisoning poultry* actionable at common law, 137.

(o) 137. 26 Geo. 3, c. 71; Burn's J. Horses.

(p) 137. 13 Geo. 3, c. 38; Burn's J. Malicious Injuries.

(q) 137. 4 Geo. 3, c. 37, s. 16; Burn's J. Malicious Injuries.

(r) 137. Not if merely to take game, 13 East, 228.

(s) 10, 11. When the criminal act is declared a *felony*, in general no action lies until after conclusion of prosecution, but sometimes it is enacted otherwise. When the injury is only a *misdemeanor* then action immediately lies, 10, note (a), 11, note (g).

(t) 137. 4 Geo. 4, c. 54, s. 3; Burn's J. Threats.

(u) 137. *Prevention*, see 130, 131. Remedy, case for injury to reversion, 7 T. R. 9.

(x) 137, 138. Case, not trover or trespass, 7 T. R. 9; 1 Ry. and Mood. 99; 5 Bar. & Ald. 826. When may sue in trespass or trover, 2 Campb. 464; 3 Id. 187; 5 Esp. R. 35. When a remainder-man may

sue in trover, 2 T. R. 376.

(y) 130, 131, 137, 138. *Preventions*.

(z) *Semble*. 7 & 8 Geo. 4, c. 30, s. 24, gives summary remedy for malicious injury to a remainder-man or reversion in personal property.

(a) 138, 139. Against a lodger for larceny, 7 & 8 Geo. 4, c. 29, s. 45.

(b) 139. To protect remainder-man, Chit. Eq. Dig. Chateaux Personal and Estate, IX., *post*, ch. viii.

(c) 139. All to join, and when not, 7 T. R. 279; 5 East, 407; 1 Chit. Pl. 74, 75. Case against co-tenant, 8 T. R. 145. When trespass for destroying, 8 Bar. & Cres. 257.

(d) 139—98. See division, *ante*, xxxi, as to such property, and injuries to same in general, 139, 140.

(e) *Books and Music*, 8 Ann. c. 19; 12 Geo. 2, c. 36; 15 Geo. 3, c. 53; 41 Geo. 3, c. 107; 54 Geo. 3, c. 156; decisions, Chitty's Col. Stat. 181; 2 Chit. Commercial Law, 198 to 205; 4 Bing. 540; 2 Young & J. 166; Godson on Patents.

(f) 98. *Busts and Sculptures*, 38 Geo. 3, c. 71, virtually repealed by 54 Geo. 3, c. 56; decisions, Chit. Col. Stat. 190.

1. Subject-matter.	2. Rights.	3. Injuries and Offences.	4. Remedies and Punishments.
II. PERSONAL PROPERTY...			
2. Not Tangible. (continued.)			
3. Engravings and prints.(g)			
4. In patterns for linen, &c.(h)			
5. Patents in general(i)		Piracies	Action, case.(k) Action, covenant.(l) Injunction, equity.(m)
3. Choses in action.(n)	1. On Contracts.		
	1. Of Record.		
	1. Judgments...	1. Nonpayment of money	1. Set-off.(o)
	2. Recognizances	2. Nonperformance of other act	2. Action of debt.(p) 3. Scire facias.(q)
	2. By specialty.	Nonpayment	1. Set-off.(o) 2. Distress, when.(r) 3. Action, debt.(s) 4. Covenant.(t)
	1. To pay money.	Breach, nonobservance.	Specific performance.(u) Action, covenant.(x)
	2. To perform other act...	Breach, commission....	1. Injunction.(y) 2. Entry for forfeiture.(s) 3. Action, covenant.(a)
	3. To omit		
	3. By simple contract.		
	1. To pay money.	Nonpayment	1. Set-off.(b) 2. Rent, distress.(c) 3. Action, assumpsit.(d) 4. Action, debt.(e)

(g) 98. *Engravings and Prints*, 8 Geo. 2, c. 13; 7 Geo. 3, c. 38; 17 Geo. 3, c. 57; decisions, Chit. Col. Stat. 192; 4 Bing. 234.

(h) 98. *Patterns on Linen*, &c. 27 Geo. 3, c. 38; 34 Geo. 3, c. 23; decisions, Chit. Col. Stat. 195.

(i) 98. *Patents*, 21 Jac. 1, c. 3; Godson on Patents; 3 Chit. Col. Stat. 197.

(k) 139. Some of these statutes expressly prescribe the remedy, as 54 Geo. 3, c. 156, s. 4; Id. c. 56, s. 3; 8 Geo. 2, c. 13, s. 1; 17 Geo. 3, c. 57, s. 1; 27 Geo. 3, c. 38, s. 2. The penalties are not recoverable unless the requisites of the statute have been complied with, 1 Bla. R. 333; 7 T. R. 620. But it is otherwise as to an action on the case, 7 T. R. 620. See 2 Chit. Pl. 760 to 768.

(l) 2 Sim. & Stu. 1.

(m) 140. *Post*, ch. viii.; 3 Meriv. 624; 2 Veb. & B. 218; 3 Ves. & B. 17; 17 Ves. 422; 1 Jac. & W. 481; 1 Madd. Ch. Prac. 157 to 165; 2 Bla. C. 407, note 14; 3 Id. 427, note 1; 3 Chit. Com. L. 622; 3 Chit. Eq. Dig. Injunction, 1054.

(n) Constitute a right to receive money or to the performance of some contract.

(o) 140. ch. vii. *Set-off by plea* or notice; 2 G. 2, c. 22, s. 13; 8 Id. c. 24, s. 4. But not to judgments or records if set-off be due on simple contract. See 6 Taunt. 176; 8 Bing. 202; 7 Id. 29, 61. May be by

motion *ex parte* to set off one judgment against the other, 8 Bing. 202; *and even to stay execution till the latter can be effected, 7 Bing. 435. In bankruptcy, 6 Geo. 4, c. 16, s. 50; 8 B. & Cres. 105.

(p) 140, 141. *Gilb. Debt*, 391, 392; 1 Chit. Pl. 126.

(q) Tidd's Prac. 9 ed. 1122, 23; 2 Saund. R. 72.

(r) See note (o), *supra*. Always by plea, 8 Geo. 2, c. 24, s. 4. 140. ch. vii. *For rent*, or rent charge, or annuity, when, 4 Geo. 2, c. 28, s. 5.

(s) 141. *Com. Dig. Debt*, A. 1.

(t) 141. 2 *Ld. Raym.* 1536. *Com. Dig. Covenant*, A. 1.

(u) Ch. x. *Specific performance when compelled in equity*.

(x) 141. *Ante*, note.

(y) 141. Injunction when granted against breach of contract, covenant, or trust, *post*, ch. viii.

(z) 288.

(a) *Ante*, note.

(b) *Ante*, note (a). May purposely purchase goods and set off the price against a prior debt, *post*, ch. vii.

(c) 140. Not unless under a *demise*, *post*, ch. vii.

(d) 141. In all cases of contract not under seal.

(e) Not if money payable by instalments, and all not due or against executor, 1 Hen. B. 547; 5 Bing. 200.

1. Subject-matter.	2. Rights.	3. Injuries and Offences.	4. Remedies and Punishments.
II. PERSONAL PROPERTY. 3. Choses in action. (continued.)	3. By simple contract.		
	1. To pay money....	Nonpayment	5. Action case.(f) 6. Injunction against paying-(g)
	(continued.)	(continued.)	
	2. To perform other acts.		
	1. To deliver goods sold.....	Nondelivery	1. Caption, when. (h) 2. Detinue, when. (i) 3. Action, assumpsit. (k) 4. Bill for specific performance. (l)
	2. Warranty of goods	Misrepresentation	1. Return goods, when or not.(m) 2. Refuse payment, when, or not. (n) 3. Reduce price. (o) 4. Action, assumpsit.(p) 5. Action, case. (q)
	3. To perform other acts.	1. Omission..... 2. Commissions	1. Specific performance. (r) 2. Injunctions, when. (s)
	4. Not to perform or to omit.....	3. Misfeasance	3. Assumpsit. (t)
	5. Other representations respecting goods	4. Malfeasance..... Wrongful performance..	4. Case, when. (u) 1. Injunction. (x) 1. Action, assumpsit.(y) 2. Case. (z)
		Deceit and damage.....	1. Assumpsit. (y) 2. Case. (a)
II. Not on Contract.	1. Legacy (b).....	Nonpayment	Action, when, or not. (b)
	2. Distributive share	Nonpayment	Bill in equity. (c)

(f) 142, note (d). If fraud in purchase and credit not expired, the declaration must be in case, 9 B. & Cres. 59.

(g) *Post*, ch. viii. Injunction against paying when, Chit. Eq. Dig. 1056.

(h) 125. *When may take*, 7 B. & Cres. 26; *Shep. Touch.* 225; *Long on Personal Property*, 147, 148; *Roberts's Stat. Frauds*, 165 to 170. *When not*, 1 Taunt. 318; 2 Campb. 240; 5 Bar. & Ald. 492; 2 Bos. & P. 584; Cowp. 294; although purchaser paid the price in advance, see cases 3 Chit. Com. L. 126, and case, as to loss by fire, 6 Bar. & Ald. 360.

(i) 125. 7 B. & Cres. 26; detinue when for a specific chattel sold, last note, *Fit. N. B.* 138; *Willes*, 120; 1 Dyer, 24, b.; 3 Woodes. 104; 2 Bla. C. 152.

(k) 3 Price's R. 68; 1 East, 203.

(l) *Post*, chap. x. When it lies, Chitty, Eq. Dig. Chittels Personal, and *post*.

(m) 126. In case of warranty of a specific chattel purchaser may immediately refuse to take, but cannot return it after once accepting, except where fraud or express agreement, 2 Bar. & Adol. 456. But goods ordered generally, if unfit, may be returned in a reasonable time, *Id. ibid*.

(n) 126. If property returned immediately, may resist any payment, 2 Taunt. 2; *aliter not*, 2 Bar. & Adol. 456.

(o) 126. May reduce damages by proof of breach of warranty. 2 Bar. & Adol. 456.

(p) 126. Action assumpsit on express, *Id.*; *post*, chap. x.; 2 East, 451.

(q) 126. *Dougl.* 21.; 2 Starkie's R. 162; 2 East, 446; 4 Bing. 73. This is the proper remedy when there is deceit without warranty, 12 East, 11; 4 Campb. 22.

(r) *Post*, chap. x.

(s) *Post*, chap. viii.

(t) 6 East, 569; 4 Bar. & Cres. 345.

(u) When a breach of contract is also a breach of duty, or misfeasance, or malfeasance, and not a mere omission, case lies, *per Bayley*, J. 5 Bar. & Cres. 605; 5 T. R. 142; 1 Chit. R. 1; 1 Chit. Pl. 153 to 155.

(a) See c. viii.; 2 Swanst. 253; 2 Mad. 198.

(g) 142. Assumpsit.

(z) 142. Case when, see note (u).

(a) 142. When the only proper remedy, 4 Campb. 22, 144, 169; 12 East, 11. Case for deceit is the proper action when the credit on which goods were sold has not expired, 9 B. & C. 59.

(b) 110 to 114. As to legacies in general, see *Roper on Legacies*, and Chit. Eq. Dig. Legacy. For a legacy of a specific personal or real chattel after *assent* trover, if personal, and ejectment, if chattel real, lies, 3 East's R. 120; 3 Atk. 224, 284; Cowp. 284, 289. So assumpsit lies for a legacy after executor's promise to pay in consideration of forbearance, *aliter not*, 5 T. R. 693; 1 Moore & P. 209; 7 Bar. & Cres. 542. So if executor has borrowed the legacy, 1 Moore & P. 209.

(c) 110. Chit. Eq. Dig. Legacies, viii., 4; 3 Ridg. P. C. 243. Not in Eccles. Court, if devise of land to pay debts, 9 Bar. & Cres. 489.

1. <i>Subject-matter.</i>	2. <i>Rights.</i>	3. <i>Injuries and Offences.</i>	4. <i>Remedies and Punishments.</i>
II. PERSONAL PROPERTY. 3. Choses in action (continued.)	II. <i>Not on Contract.</i> 2. Distributive share. (continued.)	Nonpayment (continued.)	Action on administration bond. (d) No action. (e) Bill in equity. (f) Suit in Ecclesiastical Court, ante, xxxvi. (d)
	3. Contribution to party walls.	Nonpayment	Action. (g)
	All choses in action	Criminal injuries to choses in action 1. Forgery. 2. Larceny 3. Embezzlement 4. False Pretences. 5. Stealing or injuring records, &c. 6. Concealing or destroying will	Indictment. (h) Indictment. (i) Indictment. (k) Indictment. Indictment. (l) Indictment. (m) Indictment. (n)
III. REAL PROPERTY. (o)			
1. Corporal (p)	1. In actual possession. (q)	1. Ousters, (r) and withholding possession	1. Resistance. (s) 2. Re-entry. (t) 3. Equity, injunction. (u)

(d) 8 Bar. & Cres. 151; 2 Man. & Ryl. 136, when not.

(e) 110. 7 Bar. & Cres. 542; when otherwise, 1 Moore & P. 209; 3 Bar. & Cres. 623; 3 Price's R. 54; 4 Taunt. 488, 779, 847; 6 Taunt. 522.

(f) Chit. Eq. Dig. Distribution.

(g) 14 Geo. 3, c. 78, s. 41; Chit. Col. Stat. Building Act; 2 Chit. Pl. 247.

(h) 144. Forgery, 11 Geo. 4 and 1 Wm. 4, c. 66.

(i) 144. Larceny, 7 & 8 Geo. 4, c. 29.

(k) Id. *ibid.* Embezzlement.

(l) Id. *ibid.* False Pretences. But the raising money on a second mortgage, concealing the first, is not a false pretence, *Rex v. Coddington*, Car. & P. 661. Indictment lies at common law for conspiracy.

(m) 143. *Injuring records, &c.*, 7 & 8 Geo. 4, c. 29, s. 21.

(n) 144. Concealing or destroying a will or title-deeds, Id. sect. 29, 25.

(o) 145. Real property defined, 145 to 150. 1. THE RIGHTS TO REAL PROPERTY CONSIDERED, 145 to 373. Of real property in general, and distinction between corporeal and incorporeal, 145 to 147; then an analytical division of the subject under seven heads is given, 145 to 147. First, the different kinds, under which ten general legal terms are considered, with their respective different civil and criminal injuries and offences, remedies and punishments, affecting each, 151 to 163. Then are enumerated thirty-nine principal corporeal real things, with their peculiar civil and criminal injuries and offences, remedies and punishments applicable to each, 163 to 203. Then thirteen kinds of incorporeal real things, with the pe-

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(r) 374, 375. Ouster defined, Co. Lit. 199, 200.

(s) 375. *Post*, c. vii. Resistance may be with force, but not using a dangerous instrument, 2 Salk. 641.

(t) 375. How to be made, *post*, c. vii.

(u) 375. How, *post*, c. vii.

1. Subject-matter.	2. Rights.	3. Injuries and Offences.	4. Remedies and Punishments.
III. REAL PROPERTY.			
1. Corporeal (continued.)	1. In actual possession (continued.)	1. Ousters and with- holding possession . . (continued.) 2. Trespasses. (k) . . .	4. Justices restoring possession. (x) 5. Justices, where half year's rent in arrear. (y) 6. Double value. (z) 7. Double rent. (a) 8. Action, treble damages for evic- tion of freeholder. (b) 9. Indictment, forcible entry and restitution. (c) 10. Justice's summons against pauper. (d) 11. Equity against trustees. (e) 12. Action, ejectment. (f) 13. Writ of dower. (g) 14. Bill of peace to quiet posses- sion. (h) 15. Punishment by indictment for forcible entry. (i) 1. Prevention. (l) 1. Resistance. (l) 2. What instruments may be set. (m) 3. Driving off cattle. (n) 4. Distress, damage-feasant, (o) 5. Apprehending trespasser. (p) 6. Bill, injunction. (q) 7. Bill of peace. (r) 2. Compensation. 1. Summary, justices. (s) 2. Summary, game. (t) 3. Action, trespass. (u) 3. Indictment, when. (v)

(x) 375, 376. How to proceed, *post*, c. x.

(y) 376. 11 Geo. 2, c. 19, s. 16; 57 Geo. 3, c. 52.

(z) 376, 377. 4 Geo. 2, c. 28.

(a) 377. 11 Geo. 2, c. 19, s. 18.

(b) 377. 8 Hen. 6, c. 9. Only a freeholder, 8 B. & Cres. 409.

(c) 377, 378. *Ibid.*; 31 Eliz. c. 11. Restitution afforded even to a *leaseholder* or *copyholder*, 21 Jac. 1, c. 16. Punishment by indictment at *common law*, see *post*, Criminal Injuries and Punishments.

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(f) 379, 380. Action of ejectment in general.

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(h) *Post*, c. viii.

(i) *Post*, 401, on statutes, or at common law.

(k) 380. What or not a *trespass*, *Id.* *ibid.* 9 B. & Cres. 591; 11 Mod. 74, 130; 1 Stark. R. 22, 58; 4 Camph. 220. A *mere continuance* is not a trespass, 380, 381, 382. Nor a *mere omission*; as not removing uthes, &c.

(l) 381. Preventions, with what force and by what means, *post*, c. vii.; 2 Salk. 641; 7 Bing. 316. Must not kill assailant unless to prevent a *forcible felony* endangering occupier's life, 1 East's P. C. 273, 287.

(m) 381. Not with *spring* guns, except in night

within house, 7 & 8 Geo. 4, c. 18; 4 Bing. 642. As to dog-spears, Court divided, 1 J. B. Moore, 202. *Seemle*, not legal, 4 Bing. 642; *post*, c. vii. As to *ferocious dogs*, &c.; 4 Car. & P. 297; *post*, c. vii.

(n) Ch. vii.

(o) 381, 382. *post*, c. vii. Cannot distrain chattel in actual possession, 6 T. R. 138. *Aliter*, as to *seizure* under recent acts, see note, *infra*.

(p) 381, 382. Under Game Act, 1 & 2 Will. 4, c. 32. May apprehend depredators in general *found committing*, 7 & 8 Geo. 4, c. 29, s. 43, and c. 30, s. 22. By deer-keepers, 7 & 8 Geo. 4, c. 29, s. 29. Nets and fishing-tackle, *Ibid.* s. 34, 35; *post*, 408. Criminal Injuries and c. vii.

(q) 381. Injunction to prevent wilful trespasses and damage, c. viii.

(r) Bill of peace to prevent repeated litigation, *post*, c. viii.

(s) 381. 7 & 8 Geo. 4, c. 29, depredations in nature of larceny compensated summarily. Wilful or malicious damages, injuries, or spoil, not exceeding 5*l.* compensated summarily, 7 & 8 Geo. 4, c. 30, s. 24, 34; *post*, 407, Criminal Injuries.

(t) 381. 1 & 2 Will. 4, c. 32, *post*, 403, Crim. Inj.

(u) 382. No more costs than damages unless verdict for 40*s.*, or judge certifies trespass wilful, &c., 22 Car. 2, c. 9.

(v) No indictment for a trespass, unless a *forci-*

1. Subject-matter.	2. Rights.	3. Injuries and Offences.	4. Remedies and Punishments.
III. REAL PROPERTY.			
1. Corporeal (continued.)	1. In actual possession . (continued.)	3. Riotous demolition.. 4. Omissions to remove incumbrances upon land, &c. (y) 1. Not carrying off tithe 2. Not removing other incumbrances 5. Not repairing fences (f) 6. Nuisance (m) 7. Misfeasances or malfeasances near to. 1. In pulling down adjoining wall, house, &c.	Action against hundred. (w) Indictment of rioters. (x) 1. Removal. (z) 2. Distress, damage-feasant. (a) 3. Action, case. (b) 1. Removal. (c) 2. Distress, damage-feasant. (d) 3. Action on case. (e) 1. Distraint cattle. (g) 2. Action, trespass. (g) 3. Action, case for. (g) 4. Defence of action of trespass. (h) 5. Writ to compel repair. (i) 6. Proceedings under inclosure act. (k) 7. Punishment for crim. injuries. (l) 1. Prevention. (n) 1. Abatement. (n) 2. Injunction. (o) 2. Compensation. 1. Justices, summary. (p) 2. Action, case. (q) 3. Indictment, if also public. (r) Action, case. (s)

ble entry, 3 Burr. 1701, 1706, 1731; 8 T. R. 360; not even for a conspiracy to enter a preserve and kill game, 13 East, 228; except certain entries for *night poaching*, 10 B. & Cres. 89; *post*, 401.

(w) 172, 173, 174, 410. Action, case, 7 & 8 Geo. 4, c. 31; Chit. Col. Stat. tit. Hundred. A reversioner may sue, 9 B. & Cres. 135; 4 M. & Ryl. 130. The building must have been complete and inhabited, 8 B. & Cres. 461.

(x) 172, 173, 410, 411. 7 & 8 Geo. 4, c. 30.

(y) 382. Mere omissions are not trespasses, and the remedy is in general case, as not removing tithe, 1 Stra. 634; continuing an incumbrance after recovery in trespass, 380 to 382; 1 Stark. R. 22.

(z) Can only remove, after request, to a proper distance, *semble*, 1 Stark. R. 173 to 178.

(a) May distrain damage-feasant, but cannot turn in cattle, 8 T. R. 72.

(b) Action, case, not trespass, 1 Ld. Raym. 187; 3 Burr. 1891; 8 T. R. 72; 3 B. & Cres. 213; 2 Chit. Pl. 782.

(c) Remove to proper distance, 1 Stark. R. 22, 173; 4 T. R. 364; 3 Chit. Pl. 109.

(d) 3 Wils. 20; 1 Saund. 221; Com. Dig. Pl. M. 26.

(e) Case, not trespass, after a recovery in trespass, 1 Stark. R. 22, 58, 59; 9 B. & Cres. 591. So against a mere continuer of a trespass erected or made by another party.

(f) 382. As to the obligation to repair fence, 193

to 197; Vin. Ab. Fences.

(g) 382. 1 Salk. 335; 2 Young & J. 391; 1 B. & Ald. 59; 1 Ld. Raym. 273.

(h) 3 Chit. Pl. 5th edit. 1103 to 1105, and notes.

(i) 382, 383.

(k) 41 Geo. 3, c. 109, s. 19, 24 to 28; Chit. Col. Stat. tit. Commons.

(l) 196, 197, *post*, 407, Criminal Injuries.

(m) 383.

(n) 383. How and when, 2 Smith's Rep. 9; 2 Salk. 459. By leet jury, Burn's J. Nuisance, III.

(o) 383. Chap. viii. Chit. Eq. Dig. 1055. Against darkening ancient lights, 1d. 1053; 2 Russ. R. 121; 2 Swanst. R. 333; 16 Ves. 338. Against powder mills, 19 Ves. 617; 18 Ves. 211.

(p) *Semble*, 7 & 8 Geo. 4, c. 30, s. 24.

(q) 383 to 385. 267.

(r) 442. Only indictable when the nuisance was public, not if merely private, Burn's J. Nuisance, IV. Judgment is to prostrate *building* if necessarily a nuisance, 8 T. R. 166. *Aliter*, only to stop the improper use of the building, Co. Ent. 92.

(s) 2 Stark. R. 377; 5 B. & Ald. 837; 1 Dowl. & R. 837. When it lies, 1 Dowl. & R. Cas. N. P. 35; 3 Stark. R. 162. But a reversioner cannot sue without proof of actual injury, 10 B. & C. 145. A person must build independently on his own land, and cannot sue for not propping up his house whilst pulling down another, &c. 9 B. & Cres. 735.

1. Subject-matter.	2. Rights.	3. Injuries and Offences.	4. Remedies and Punishments.
III. REAL PROPERT			
I. Corporeal..... (continued.)	I. In actual possession (continued.)	7. Misfeasances, &c. (continued.) 2. Insufficient steam engines.....	Action, case.(t) Indictment, costs.(u)
	II. In remainder or reversion	1.* Same injuries as to possession.(x) 2. Waste(y)	1. Prevention.(z) 2. Injunction, waste.(a) 3. Justices, summary.(b) 4. Writ, waste.(c) 5. Action, case.(d) 6. Trover.(e)
		3. Breaches of covenant by waste, &c.(f)....	1. Entry to repair.(g) 2. Injunction.(h) 3. Entry, forfeiture.(i) 4. Action, covenant.(k) 5. Action, case.(l) 6. Ejectment.(m)
	III. Parceners, joint tenants and tenants in common (v)	4. Other small injuries	Justices, summary.(n)
		1. Same as to a single proprietor. 2. Inter se (p).....	1. Prevention.(q) 2. Equity, injunction.(r) 3. Trespass.(s) 4. Action, case.(t) 5. Ejectment.(u)
II. Incorporeal realty.(x)			
1. In general	Private rights	Injuries in general (y) ..	Remedies in general.(z) 1. Prevention. 1. Abatement.(a)

(t) 2 Dowl. & R. 33; 6 Moore, 47.

(u) Indictment and costs, 1 & 2 Geo. 4, c. 41, s. 1.

(x) Rights in, 264 to 268; Injuries in general, 385 to 393.

(y) 386 to 393. As to waste in general, 5 B. & Cres. 603; 1 Chit. Pl. 161, 162.

(z) 391. May enter to prevent, 8 Coke, 146.

(a) 391, *post*, chap. viii. 4 Madd. 393; 5 Madd. 45.

(b) 392, n. (d). *Semble*.

(c) 391, 392. 2 Saund. 251, 259.

(d) 391. When case or trespass, *Id*.

(e) 392. 7 T. R. 13.

(f) 386.

(g) 389 to 391. Entry to repair.

(h) 391, *post*, chap. viii. Injunction.

(i) 391. Entry, forfeitures, 288 to 291.

(k) 389, 391. Covenant, when not, 1 B. & Cres. 410; 9 B. & Cres. 505; 1 Cramp. & J. 105.

(l) 389, n. (a). Case or covenant.

(m) 288 to 291. 391.

(n) 407. *Semble*, 7 & 8 Geo. 4, c. 30, s. 24.

(o) 268 to 272. Rights between, in general.

(p) 268 to 272. Injuries *inter se* in general.

(q) 375. One may always prevent injury, not using dangerous instrument.

(r) 393. 271, 272. Injunction.

(s) 272. Trespass for destruction.

(t) 303 n. (m). Case for injury

(u) 271. 374, 375. Ejectment, ouster, when implied.

(x) *General Points*, 203 to 206. Distinguished from corporeal, 206 to 229. Several kinds enumerated, as ancient lights, pews, common, ways, watercourses, advowsons, tithes, offices, dignities, franchises of several kinds, corrodies, annuities and rents, with their respective particular injuries and remedies. 229 to 238. Tenures by which held. 238 to 264. Estates or interests therein. 264 to 268. Times of enjoyment. 268 to 272. Number of owners. 272 to 365. Titles to, how acquired; and herein in particular that they lie in grant, and must be created by deed of grant, or by prescription implying it, or by devise, see 203, 309; and transferred by assignment or devise, 319. 393 to 413. Injuries and remedies in general to incorporeal real property.

•(y) 393 to 413. *Injuries in general*.

(z) 383, 384. 393 to 413. *Remedies in general*.

(a) 383 to 412. 2 Smith's Rep. 9. Prevention or removal of injury to incorporeal realty seems in general permitted, carefully avoiding any breach of the peace or unnecessary damage. In general it should, when the injury consists in omission or mere continuance, be preceded by a request that the wrong-doer himself remove the nuisance, 2 B. & Cres. 302; *post*, chap. vii.

1. Subject-matter.	2. Rights.	3. Injuries and Offences.	4. Remedies and Punishments.
III. REAL PROPERTY.			
II. Incorporeal realty.			
1. In general . (continued.)	Private rights (continued.)	Injuries in general (continued.)	1. Prevention.—(continued.) 2. Mandamus.(b) 3. Equity, injunction.(c) 2. Compensation. 1. Action, case.(d) 2. Summary.(e) 3. Ejectment.(f) 3. Punishment. 1. Summary.(g) 2. Indictment, when.(h)
2. Ancient lights	Immediate enjoyment . .	Obstruction	Remedies.(i)
3. Pews	Immediate enjoyment . .	Disturbance	Remedies.(h)
4. Commons(l)	Immediate enjoyment . .	Disturbance.(l) 1. Obstruction 2. Turning off cattle 3. Putting on cattle and surcharges . . 4. Deterioration of soil 5. Rabbits or lord's overstock 6. Illegal improvements, trees, &c. 7. Other injuries . .	Abatement.(l) Injunction.(m) Action, case.(n) Action, trespass.(o) Distraint.(p) Action, case.(q) Action, case.(q) Summary, justices.(r) Action, case.(s) Injunction.(t) Action, case.(u) Action, case.(u) Summary.(v) Criminal proceeding.(y)
5. Ways. Private(z)	Immediate enjoyment . .	Disturbance.(a) 1. Obstruction 2. Nuisances 3. Driving cattle back	Abatement.(a) Action, case.(a) Covenant.(a) Summary.(b) Indictment.(c) Same remedies. Action, trespass.(d)

(b) 412. *Mandamus*, when a clear case of public duty.

(c) 208. Equity, injunction, Chit. Eq. Dig. 1053, 1055.

(d) 393, 394, 412, n.(d).

(e) *Semble*, 7 & 8 Geo. 4, c. 30, s. 24.

(f) 371, n.(s). Not in general, only for tithes of parish.

(g) 407, 408. *Semble in general*, 7 & 8 Geo. 4, c. 30, s. 24.

(h) 412, 413, 192, 193, 198. Only when injury to a public incorporeal right.

(i) *Ancient lights*, 207, 208, 394. Same as the above general remedies.

(k) *Pews*, 208 to 210, 394. Action case, or suit in ecclesiastical court, *Id. ibid.*

(l) *Common rights*, 210 to 214. Injuries, *Id.* 394 to 397. Abatement, when or not, 394 to 397.

(m) 315. Injunction, equity.

(n) 396. Action, case.

(o) 396, 397. *Trespass*, 2 Chitty's Pl. 5 ed. 858.

(p) 396. But not recommended, action, case preferable.

(q) 396. Action, case.

(r) 407. *Semble*, 7 & 8 Geo. 4, c. 30, s. 24.

(s) 396. Action, case, but not killing rabbits, &c.

(t) 395, 396. Injunction, action case.

(u) 394 to 396. Action, case.

(x) 407, 408, 7 & 8 Geo. 4, c. 30, s. 24, *semble*.

(y) 407. *Semble*, summary proceeding, 7 & 8 Geo. 4, c. 30, s. 24, and on inclosure act, 397, n.(b), (c), (d).

(z) Right of private ways, 214, 397.

(a) Injuries and remedies, 397, c. vii.

(b) 407. *Semble*, 7 & 8 Geo. 4, c. 30, s. 24.

(c) 412, 413.

(d) *Action, trespass*, 2 Chitty's Pl. 5 ed. 858.

1. Subject-matter.	2. Rights.	3. Injuries and Offences.	4. Remedies and Punishments.
III. REAL PROPERT <small>Y</small> .			
11. Incorporeal realty (continued.)	Immediate enjoyment . . (continued.)	4. Not repairing . .	Action, covenant, or case. (e)
6. Water-course (f)	Immediate enjoyment . .	Disturbance. 1. Obstructing water to or from 2. Increase of	Abatement. (g) Injunction, equity. (h) Action, case. (i) Summary, justices. (k) Indictment. (l)
7. Adwovson	Immediate	Disturbance	Quare impedit. (m)
8. Tithes (n)	1. Of whole parish	Injuries in general (o) . . Injury to right. 1. Ouster	Remedies in general. (p) Ejectment. (q) Bill in exchequer. (r) Bill in chancery. (r)
	2. From a particular parishioner. 1. Predial tithes . .	Subtraction. 1. Before set out. 1. Refusing to set out	Remedies. 1. For single value of tithe. 1. Bill in exchequer. (s) 2. Bill in chancery. (s) 3. Suit in ecclesiastical courts. (s) 4. Justices, summary. (t) 2. For treble value. (u)
		2. Refusing to pay modus	Bill, equity. (v)
		3. Refusing to pay composition	Action. (y) Summary, justices. (z)
		2. After set out. 1. Withholding	Caption. (a) Trove. (b)
		2. Damaging	Action, trespass. (c) Justices, summary. (d)

(e) 379. Action, covenant, or case.

(f) Rights to, 189 to 193, 197, 215, 224. No right of appropriation, 191, 192.

(g) 215, 398. Abatement, 2 Smith R. 9.

(h) 398 n. (r), 191, 192. Injunction, equity.

(i) 215, 398. Action, case, when trespass, *Id. ibid.*

(k) 407, 408. *Scmble*, 7 & 8 Geo. 4, c. 30, s. 24, and as to illegal fishing, 7 & 8 Geo. 4, c. 29, s. 34, 35, 36, and considerable malicious mischief, 7 & 8 Geo. 4, c. 30, s. 12, 15.

(l) 192, 193, 198. Indictment.

(m) 398.

(n) Right to, in general, 218 to 221, 374, 398, n. (s).

(o) Injuries in general, 218 to 221, 398, 399.

(p) Remedies in general, *Id. ibid.*

(q) Ejectment for tithe of whole parish, at suit of lay impropiator, given by 32 Hen. 8, c. 7, s. 7; Cro. Car. 301; 2 *Ld. Raym.* 789; 2 *Saund.* 304, note 12. When not, 2 *Rol.* 309; 3 *Bla. C.* 88.

(r) When in general, 1 *Mad. Ch. Prac.* 101 to 109.

(s) Bill for an account of single value in exchequer or chancery, and for single value, waving penalty, 1 *Mad. Ch. Prac.* 104 to 109. When single value is small, but exceeds 6*l.* 13*s.* 4*d.*, a suit in equity for single value is preferable to debt for treble value, because costs are recoverable in equity, 398, 399.

(t) Summary before justices, when, 221, 399.

(u) 398, 399. Treble value, 398, 399; 2 & 3 *Ed.* 6, c. 13, s. 1. See note (a) as to costs. Of agistment tithe, 3 *Anst.* 763; but as to small tithe, *Moore*, 915.

(v) *Supra*, note (r).

(y) Assumpsit or debt, 399, n. (b).

(z) 221, 399.

(a) 399. *Scmble*, *post*, c. vii. May enter by usual occupation way to remove, 2 *New R.* 466.

(b) *Scmble*, after tithe set out, the separate property vests in tithe owner.

(c) 399. 8 *T. R.* 72.

(d) *Scmble*, 7 & 8 Geo. 4, c. 30, s. 24.

1. <i>Subject-matter.</i>	2. <i>Rights.</i>	3. <i>Injuries and Offences.</i>	4. <i>Remedies and Punishments.</i>
III. REAL PROPERTY.			
II. Incorporeal realty (continued.)	1. Predial tithes (continued.)	3. Obstructing removal by ordinary way . . 4. Owners not removing	Action, case. (e) Action, case. (f)
	2. Personal and mixed.		
	1. In kind	Subtracting	Bill in equity. (g). Suit in ecclesiastical court. (h) Justices, summary. (i) Bill in equity. (k)
	2. Modus	Subtracting	
	3. Composition	Not paying	Action. (l) Justices, summary. (m)
III. All the above	All the above	Criminal Injuries	Criminal Punishments. (n)

(e) 399. 2 New R. 466.

(f) Case not trespass, Stra. 634; Ld. Raym. 1399; Occupier cannot turn on cattle, 8 T. R. 72; but may distrain the tithe as damage-feasant, 399.

(g) Same as ante, xlii. note (s).

(h) Ante, xlii. note (s).

(i) 221, 399.

(k) Same as ante, xlii. note (s).

(l) Action, assumpsit or debt, 399, n. (f).

(m) 221.

(n) The particular criminal injuries and punishments applicable to each kind of real property will be found stated under each, ante, 162 to 229, 268. The general criminal injuries and punishments are stated 400 to 413, such as forcible entries, 401, night poaching, id., game act, 403, setting spring guns, 406, small malicious injuries, 407, burglary, arson, and riotous demolitions, 410, 411, and other criminal offences to real property, 412, 413.

CHAPTER I.

OF RIGHTS, INJURIES, AND REMEDIES, IN GENERAL.

A PARTY who considers himself about to be, or to have been injured by the conduct of another, naturally wishes to adopt the *best* means to *prevent* or *remove* the injury, or to enforce *specific relief*, or *performance*, or *compensation*, or *punishment* for its commission; on the other hand, the party resisting the claim wishes to know whether he can do so effectually, and by what means; for these purposes, each of these parties, complainant and defendant, or at least his professional adviser, must well consider the *law* affecting the asserted *right* and the nature of the *injury* or *offence*, and the *remedies* or *punishments*, before he can safely take any step, whether precautionary, offensive or defensive, or he may find himself in *error*, and perhaps that he has, although unintentionally, become a wrong-doer by adopting some illegal, irregular or injudicious course, and will sometimes not only incur great and useless expense, but frequently lose all redress. Independent of the process of the courts, there are many cases in which a person may clearly, by his *own act*, *prevent* or *remove* an injury, or obtain *satisfaction*, and which may be known to all members of society; as, for instance, every one knows that he may resist an assault or direct attack upon his person by *self-defence*. But the great variety of the remedies by *acts of the parties themselves*, and of the *modes* or *degrees* of resistance or prevention without legal process, are but little known; and in many cases the *summary* remedies by the intervention of *legal assistance*, and the *modes* of applying them, are still less known, and are frequently mistaken or attended with danger of *excess*; and much judgment is required in the *choice* of one of several remedies, by the intervention of *legal authority* and in the *modes of conducting them*, and many of them are accompanied with technical difficulties. The object of the following pages is to enumerate and remove them.

Necessity for
ascertaining the
nature of rights,
injuries and
remedies in
general.

CHAP. I.
NECESSITY, &c.General division
of rights, inju-
ries and reme-
dies.

In most civilized countries the laws made for protecting the public interests of the society at large, and the private rights of individuals composing it, have been judiciously classed and arranged under certain distinct heads, as, 1st, *Rights*; 2d, *Injuries*; and 3dly, *Remedies*. Rights and duties have again been divided into those which are *private*, or belonging to particular *individuals*; and *public*, those which belong to *society at large*. *Injuries (in jus)* or offences, also, as well as their *remedies*, naturally follow the same divisions and arrangement. These several rights, injuries, and remedies, are all subject to numerous modifications and varieties, and the rules respecting them are multifarious. In the present chapter we will take a concise view of the principles and rules which affect rights, injuries and remedies *in general*; and in the three next immediately following chapters will be given a *practical* view of *each* right and its *particular injuries* and *remedies*, with some suggestions with respect to the conduct advisable to be pursued in cases of difficulty that frequently arise. We shall then be prepared for the consideration of the still more practical parts of the subject.

I. OF RIGHTS,
PUBLIC and
PRIVATE, IN
GENERAL.

Rights and Duties (the converse of each other), as recognized by law, (a) have always been divided into *public* and *private*. Some of each are founded upon the *common law*, others have been created or modified by *statute*.

1. PUBLIC
RIGHTS.

Public rights, when they relate to *all society in general*, are termed the rights or *law of Nations*; (b) and when they affect

(a) There are many *moral* and *religious* rights and *active* or *affirmative* duties not recognized or enforced by *municipal law*, such as affection and kindness between husband and wife and children, education of children, and charity and benevolence to all mankind, &c. Those rights and duties which are recognized and enforced by law are termed *perfect*; those which are not so enforced, are termed rights and duties of *imperfect obligation*. See observations in *Mellish v. Motteux*, Peake's Rep. 115, 116; Pal. Mor. Ph. 3 vol. 4; 1 Bla. C. 123. The common law of England considers that many moral and religious *affirmative* duties are better left in their *performance* to the impulse of nature, and their *violation* to the censure of conscience and of society. But it has been observed, that as to *negative* duties it is otherwise, and that there is no act which *Christianity forbids* that the law will not reach, per

Best, C. J., *Bird v. Holbrook*, 4 Bing. 641. Perhaps, however, that position is too largely laid down; no one will doubt that Christianity *forbids* a great variety of immoral and improper acts, but the breach of which is not punishable.

(b) It will be observed that injuries against the rights and law of *Nations* are never cognizable in a municipal Court, but only by the King or some particular Court or persons particularly commissioned by the King to take cognizance of such injuries, as in the instance of our Prize Courts, under a particular commission. There is no proper *international Court*, and no action can in general be sustained in a municipal Court for a hostile capture or seizure; *Elphinstone v. Bedechemed*, Knapp's Rep. 316 to 361; *Caux v. Eden*, Doug. 594; but the proceeding must be in the Admiralty under the special commission from the King.

only a particular state or separate community, they are termed *Municipal*. The latter relate to God, religion, morality and decency; or to the king and royal family, and his prerogative, revenue and government; or to subordinate magistrates and other public officers; or they relate to the regulations of *all* the individuals, subjects of the country, as those respecting public justice, peace, trade, health and police, and the protections of *all* persons and their property; and the violations of, or injuries and offences to which, have the influence of bad example, and a tendency to be *generally* injurious to *all* members of the society. We shall find that in the observance of these public rights in general each individual has so far a *private* right or interest, that he may insist on and compel the observance, or cause the injury to be punished, by becoming a public prosecutor or accuser, but that in general this must be in the name of the King, or at least *as* on the behalf of the public society at large, or, in the case of pecuniary penalties for an offence, in the name of a *common* informer, either for himself and the King, or for himself and the poor of the parish, or as of late for the county rate, and seldom entirely for his own private and particular benefit. Some public rights, however, are *also* sometimes *private*, so that any individual who happens to be *particularly* interested or injured may act for himself, and have his *private* remedy as well as prosecute for the benefit of the community; (c) and therefore rights of this nature will throughout this work be considered at the same time that mere private rights are examined, though strictly they might more properly belong to a work on criminal law.

Private rights (including their converse *duties*) are those which appertain to a *particular* individual or individuals, and relate either to the *person* or to *personal* or *real property*; and the first respect either *his own* particular *person*, as personal security of his life, body and limb, health and reputation, or his personal liberty; or they regard *his interest* in some particular *relation* (being termed his *relative* rights,) as to his wife, child, ward, apprentice, or servant. *His duties* towards them constitute *their* rights or claims upon *him*.

2. PRIVATE
RIGHTS.

First, Of Person.

And see *Hill v. Reardon*, 2 Sim. & Stu. 431. But this rule does not extend to take away the jurisdiction of the Court of Chancery, where a person, in whose favour an adjudication has been made, is affected by a trust or by fraud, that Court then having jurisdiction to enforce the

trust or relieve against the fraud. Same case, 2 Russ. R. 608, A.D. 1827, qualifying the Vice-Chancellor's decision in 2 Sim. & Stu. 437.

(c) *The Mayor of Lyme Regis v. Henley*, 3 Bar. & Adol. 77, and *post*, 11.

CHAP. I.
RIGHTS, &c.
Secondly,
Rights to Per-
sonal Property.

The rights to *personal property* involve the consideration of the *nature* of the *thing itself*, and the extent of the interest therein, and the modes by which the rights thereto may be acquired and transferred. There are certain peculiar properties affecting most personal property, and which render it in legal estimation inferior to real property, and consequently distinguish it in various important respects. These are, principally, that it gives no right to vote on various occasions, as real property does: *secondly*, that property in personal chattels may be originated or created without any written document, and that it may be alienated or transferred from one to another by mere delivery or verbal assignment, without title-deeds; whereas in general some deed or written document is essential to the transfer of real property: *thirdly*, the whole interest in most tangible personal property may be taken in execution and sold, when at most only a part of the annual value of real property can be taken by a single creditor: *fourthly*, upon death the legal interest passes to the executor or administrator of the owner; whereas real property descends to the heir, unless legally devised: *fifthly*, if felony be committed by the owner, the whole of his personal property is forfeited; whereas only the profits of his real estate is forfeited during his life, and upon his death it descends to his heir. These are only a few of the leading distinctions; sufficient, however, to establish the importance of the division. The term *personalty* includes every thing moveable, whether animate or inanimate, when the law considers them to be the subject of property, and sometimes things quasi moveable, as tenants' fixtures; and whether tangible or not, such as choses in action, or things which cannot be beneficially obtained without suit; and there are some description of interests which, though connected with and issuing out of realty, yet, being temporary and only for *years*, are considered merely as *personalty*, such as leases for years. So canal shares are in general only personal property, and therefore give the owner no right to vote for a member of parliament; (d) though sometimes shares in bridges, rivers, &c. are real property. (e) So because a company, having only the *navigation* of a river, have no interest in the soil or realty, they are not rateable to the relief of the poor, although they have a dam erected in the river. (f) Like real property, the interest in *personalty* may

(d) *Hollis v. Goldfinch*, 1 Bar. & Cres. 205; *King v. Thomas*, 9 Bar. & Cres. 114, acc.; but see *Buckridge v. Ingram*, 2 Ves. 651; *Howe v. Chapman*, 4 Ves. 542,

contra.

(e) *Rogers on Elections*, 27.

(f) *Rex v. Air and Calder Navigation*, 3 Bar. & Adol. 139.

be either absolute for ever, or only temporary for life or for years, or it may be solely in one person, or in several as joint tenants or tenants in common; or with respect to the time of enjoyment it may be in possession or in remainder or reversion; and the modes of creating or transferring it are various, viz. by mere possession, (generally sufficient against all wrong-doers,) or by prerogative or forfeiture, by custom, by gift or grant, by bankruptcy, by will or testament, or under the statute of distribution, but principally by *contracts*, which, though formerly otherwise, has now become by far the most frequent and important ground of claim to *personal chattels*, and to *debts* and *damages* for the nonperformance of contracts.

The rights to *real property* are various, as regards, *first*, the *subject-matter* or nature of the thing itself; as whether it be corporeal or tangible, or incorporeal or nontangible: corporeal being houses, lands, and every other visible, tangible and immoveable property; and the latter or incorporeal being a property which cannot in general be touched, and has no *corpus*; such as rights of common, or rights of way and other easements, and rights which, though they may be enjoyed in, upon, over or relating to land or other corporeal property, yet in consideration of law constitute no right to the land itself.

Thirdly, Rights to Real Property.

There is also one description of property connected with land which may be either real or personal property, depending on the statute which creates it; as *canal shares*, which under some acts are real property, and under others mere personalty, although issuing in some respects out of land. (g) These distinctions will be found of the utmost practical importance, not only as they affect the modes of *creating* and *transferring* the right and the wrong, and remedies relating thereto, but also as regards the extent of the incidents connected with the property. Thus a person who has a *freehold* interest in houses or *land*, is entitled to vote in the election of a member to serve in parliament, as part of or appurtenant to the principal right; but not so the owner of a mere right of common or other easement, though perhaps it may in reality be much more valuable than the house or land, but which seems in general, by the terms of the original grant or by usage, limited in beneficial enjoyment to *itself*, and has no excrement or collateral right or appurtenant growing out of the same.

Real property, *secondly*, is to be regarded with respect to the *tenure* and *quantity* of *interest*, and principally whether

(g) *Buckeridge v. Ingram*, 2 Ves. 652; 205; *The King v. Thomas*, 9 Bar. & Cres. 114; 4 Ves. 541.
and *Hollis v. Goldfinch*, 1 Bar. & Cres.

CHAP. I.
RIGHTS, &c.

it is a freehold or a copyhold interest. If the former, a moiety of the owner's legal interest may be seized under an elegit, but no execution at the suit of a creditor will affect the debtor's *copyhold* interest; though if he become bankrupt, or be discharged as an insolvent, the entire freehold as well as copyhold interest may be sold for the benefit of the creditors. So with regard to the extent and duration of interest, it may be an estate of inheritance or only for life, and either for a party's own life or for that of another, as dower, or tenancy by courtesy, &c., or it may be only for years, or strictly at will or by sufferance. So with regard to the *number* of owners, it may be in joint tenancy or coparcenacy or in common; and with regard to the *time of enjoyment*, it may be in possession, remainder, or reversion; and as to the *modes by which these several interests or rights may be acquired or transferred*, it may be by descent, or by purchase, as it is technically termed, which includes not only purchases, vulgarly so termed, (where some conveyance upon a sale has been executed,) but also when the estate has been obtained by *any* other means than by *descent*; as when the property is merely in possession without strict title, and which possession may enable him to sue a mere wrong-doer in trespass, (h) or even in ejectment, (i) or by special occupancy, prescription, or by alienation, whether by deeds of various kinds, or by matter of record, as by fine or recovery, or by special custom, or by devise. The different modes of acquiring the right (and the exact knowledge of which constitutes the science of conveyancing) frequently affect the remedies, and in practice are essential to be well considered before deciding in any difficulty upon any injury or remedy affecting these rights.

Fourthly, Rights are temporal, either legal or equitable; or they are ecclesiastical or spiritual; or cognizable only in a Prize Court.

It is further necessary, with respect to private rights and duties, to observe, that they are *temporal*, or *ecclesiastical*, or *spiritual*; the former are generally cognizable only in the Common Law or Equity Courts; the latter only in the Ecclesiastical or Spiritual Courts. Thus alimony and restitution of conjugal rights, and punishment for verbal slander merely imputing fornication or other offence of a spiritual nature, and unattended with special damages, must be proceeded for in the latter Courts. Again: the former or *temporal* rights are either *legal* or *equitable*, and Courts of *Law* in general only take notice of and remedy the infraction of *legal* rights, and if an action is to be brought, it must be in the name of the *legal*

(h) *Graham v. Peat*, 1 East, 244; 4 Taunt. 548; 8 East, 356. 47 (c); 7 Bingham, 346; 1 Chitty on Pleading, 218, note (c).

(i) 2 Saund. by Patteson & Williams,

owner, being the party in whom the legal right or interest is vested, though he have no beneficial interest; and the person trusting or confiding in the trustee (being the *cestui que trust*) cannot sue in his own name, (*k*) still less can he sue his own trustee, (*l*) but recourse must be had by him to a Court of Equity. (*m*) Courts of Common Law will not in general notice mere *equitable* rights, as contradistinguished from the strict *legal* title and interest, so as to invest the equitable or merely beneficial claimant with the ability to adopt *legal* proceedings in his own name, although the equitable right may embrace the most extensive, and indeed the exclusive interest in the *benefit* to be derived from the contract or other subject-matter of litigation. This rule could not be disregarded without destroying the fundamental distinctions wisely constituted between Courts of Common Law and Courts of Equity, with regard to the cognizance of rights and the remedies peculiar to each jurisdiction. If the *cestui que trust* were permitted to sue at law in his own name, the benefits and protections intended to result from the intervention of the trustee, clothed with the legal title, might be lost, and the advantages arising from giving the Court of Equity exclusive control over matters of trust would be defeated. Thus if a husband could proceed at law for a legacy left to the separate use of his wife, he might receive and spend the whole, and leave his wife destitute, when, if compelled to resort to a Court of Equity, terms may be imposed and maintenance secured. (*n*) Besides it would be impossible, consistently with the common principles of jurisprudence, to exclude the power of the trustee to sue in respect of his *legal* right, and it would be highly mischievous and unjust to permit the defendant to be harassed by two proceedings upon the same contract or transaction. The right of action is therefore wisely vested solely in the *party* having the strict *legal* title, in exclusion of the mere equitable claim; and if a right be vested in A. for the use of B., the latter can neither release nor sue at law for an injury. (*o*) And this rule, though in general established by decisions respecting *actions*, has a more extensive application and extends to proceedings antecedent to litigation; thus a notice to quit, or a demand, &c., should be in the name of the legal owner

(*k*) 1 East, 497; 8 T. R. 332; 1 Saund. 158, n. 1; 7 Mod. 116; 2 Sanders on Uses and Trusts, 222; 2 T. R. 696; 7 T. R. 667; 2 Bingham, 20; where this rule is explained and elucidated.

(*l*) Id. *ibid*.

(*m*) Id. *ibid*.

(*n*) See observations of Lord Kenyon in *Goodtitle v. Jones*, 7 T. R. 50; and in *Bauman v. Radenius*, 7 T. R. 667.

(*o*) Id. *ibid*.; 2 Inst. 673; 1 Lev. 238; 3 Id. 139.

CHAP. I.
Rights, &c.

and party who must afterwards sue or prosecute, and not merely in the name of the party beneficially and equitably interested, though he may properly *join*, to show his concurrence in the proceeding for his benefit. However a cestui que trust in actual possession may in general sue a wrong-doer in trespass for an injury to the *possession*, for in that case the *title* would not come in question, and bare possession is sufficient against a wrong-doer.^(p) Nor is the distinction between legal and equitable rights confined in its consequences to the *jurisdiction* or *form* of the remedy, it affects in various cases the *right itself*, at least as regards collateral incidents. Thus if a person be in possession of an estate merely under an *agreement* of purchase, without an actual conveyance, and have children and die, he had merely an *equitable estate*, and it follows that if his widow subsequently reside with his children on the estate, she does not thereby acquire a parochial settlement as if her husband had had the *legal* estate, because a widow can never be guardian in socage of an *equitable* interest, but only where a *legal* estate has *descended* on her child, although at any instant a Court of Equity would have decreed a conveyance of the legal estate to such father or child.^(q) So if under colour of war the personal property of a person be illegally *captured*, he cannot try his right to restoration or compensation in any temporal Court, but must sue alone in the Prize Court, having jurisdiction over prize questions by special commission from the King.^(r)

II. INJURIES
whether PRI-
VATE OR PUB-
LIC.

Injuries like rights are *private* or *public*, and as they affect the person, personal or real property, naturally follow the same arrangement as that of rights. In considering them, so as to decide on the proper remedy, it will be found in general necessary to ascertain *four* points: 1st. The *nature of the property* and right affected, and whether it was public or private, corporeal or incorporeal; • 2dly. The *mode of committing the injury*, as whether it was a felony or only a misdemeanor, or a tort, or a breach of contract; and if a tort, whether it was committed under colour of process, and whether it was direct and immediate or only consequential, and whether it was with or without force, and if the latter, whether it was a nonfeazance, misfeazance, or malfeazance; and 3dly. *Upon what occasion* or

(p) 1 East, 244; 2 Saund. 47 (d).

(q) *Rex v. Toddington*, 1 Bar. & Ald.
560; 2 Mod. 176; Co. Lit. 87, b. note

1, by Hargreave; Vin. Ab. Guardian, I.

(r) *Ante*, 2, note (b).

for what purpose the injury was committed, and whether *prima facie* lawful or illegal; and sometimes, 4thly, With *what intent* it was done, as whether with or without *malice*.

CHAP. I.
INJURIES, &c.

Thus, *first*, with respect to the nature of the thing affected and right thereto. Injuries to the person, and to personal and real property *corporeal* in the possession of the claimant, may be *direct* and with *force*, and the remedy may be trespass *vi et armis*; but if the property were *incorporeal* and not tangible, or not in possession, and the interest were in remainder or reversion, then the injury to such a right cannot be considered as committed *directly* with *force*, and consequently it would be incorrect to describe it or its consequent damage as committed with force; and as the *character* of another is not corporeal or visible, the injury must be stated accordingly, and the remedy in the latter instance is *case* for the consequential injury.

Material to consider *first* the nature of the thing affected, and right thereto.

Secondly. Injuries may be by nonfeasance, misfeasance, or malfeasance; *nonfeasance*, the not doing that which it was a legal obligation, or duty, or contract to perform; *misfeasance*, the performance, in an improper manner, of an act, which it was either the party's duty or his contract to perform, or which he had a right to do; and *malfeasance*, the unjustifiable performance of some act which the party had no right, or which he had contracted not to do. These several modes of committing private injuries are compensated by peculiar and appropriate remedies, in which the cause of action must be properly described. Again: if the injury were committed by improperly putting in force either criminal or civil *process* duly and regularly issued, no action of *trespass* could be supported, but the proper remedy would be, after an acquittal or verdict for the defendant, an action on the *case* for maliciously, and without probable cause, arresting the party, or otherwise causing such lawful process to be put in force; for, excepting in cases of excess, no man can be treated as a trespasser for acting under lawful process, and according to its direction, however maliciously he may have obtained it. (s)

Secondly. The nature of the injury itself.

Again: it is of the utmost importance to consider whether the injury complained of was strictly an injury *public* or *private*, as the answer will not only regulate the conduct of parties acting for themselves, but also materially affect the substance as well as the form of the remedy. Thus an indi-

Whether the injury was public or private, and whether a felony, &c.

(s) Per Lord Kenyon, *Belk v. Broadwood*, 304; 1 Dow. & R. 97, S. C.; 1 Chit. Pl. 3 Term R. 185; *Elsce v. Smith*, 2 Chit. R. 214, 215.

CHAP. I.
INJURIES, &c.

vidual may of his own accord, and without previous request, abate many *public* nuisances or injuries of *commission*, and perhaps with *more force* and to a greater extent, and without such particular care to avoid injury to the materials than he could a *private* nuisance; (*t*) whereas if it were a mere *omission*, there should be a prior request, and if it were a private nuisance, (*u*) he must cautiously avoid doing more than what is strictly necessary for the enjoyment of his right, and if guilty of any excess he will be a trespasser at least *pro tanto*, if not *ab initio* for the whole. (*x*) So if the injury were *merely public*, the remedy can only be public, and no particular individual could proceed by *action* for compensation for the supposed injury that he has individually sustained; for, otherwise, many individuals would sue separately, and there would not only be a multiplicity of suits (which the law considers should be suppressed); (*y*) and as each individual would be content to receive or recover his private compensation, the general interest of the public would be disregarded, and the nuisance perhaps continued, or the crime be inadequately punished; and for this reason, in general, the remedy must be by indictment or criminal proceeding for a nuisance to or for not repairing a public highway, or bridge, or other offence affecting a public right. (*z*) So in cases of *felony* the remedy by action for the private injury is generally *suspended*, (sometimes, erroneously, termed *merged*), until the party particularly injured has fulfilled his duty to the public by prosecuting the offender for the public crime. (*a*) And for homicide all civil remedy is entirely *merged* in the felony, (although compensation is sometimes afforded to the widow, or relatives, in case of the homicide of a person endeavouring to apprehend an offender); therefore no action lies for

(*t*) In *Lodie v. Arnold*, 2 Salk. 438, the Court held, that when an individual has a right to abate a *public* nuisance, he is not bound to do it orderly, and with as little hurt in abating it as can be, and, therefore, the defendant was not answerable in that case for the rolling into the sea of the materials of an house erected across, and constituting an injury to a public way. And in another case of public nuisance, although the defendant might have opened the gate without cutting it, yet the cutting was holden not to be illegal, as the party did it in abatement of a public nuisance; *id. ibid.* So upon a cry of murder any person may break open the outer door of an house to prevent the commission of such public offence, though

if a mere private assault had been committed, it might have been otherwise. 2 Bos. & Pul 260,

(*u*) 2 B. & Cres. 302.

(*x*) 9 Co. Rep.; 2 Stra. 686; Godb. 221; 1 Stark. R. 56, 173.

(*y*) Although that reason applies in *this case*, it is not in general any answer to an action; for, as has been observed, if a man will commit an injurious act to the separate rights of several, there is no reason why he should not make separate satisfaction to all.

(*z*) *Russell v. The Men of Devon*, 2 T. R. 667; 11 East, 349, 355. Same reasoning, 3 Bla. Com. 219, 220.

(*a*) 7 & 8 Geo. 4, c. 29, s. 57; 2 T. R. 750; 12 East, 409; 2 Car. & P. 41.

the battery of a wife or servant whereby death ensued, (b) and, in general, all felonies *suspend* the civil remedies; (c) and before conviction of the offender there is no remedy against him at law or in equity; (d) but *after* conviction and punishment on an indictment of the party for stealing, the party robbed may support trespass or trover against the offender; (e) and after an acquittal of the defendant upon an indictment for a felonious assault and stabbing, the prosecutor may maintain trespass to recover damages for the civil injury, if it be not shown that he colluded in procuring such acquittal. (f)

In some cases of *misdemeanors*, and other particular offences, there are express enactments that the civil remedy shall not be affected by the criminal; as in the case of embezzlements by clerks, bankers, &c. (g)

But in the former case of a *public* nuisance, which is merely a misdemeanor, if a particular individual has sustained actual and particular material damage or inconvenience in consequence of the offence; as if in throwing a log into a public highway it hurt an individual, or afterwards occasion his horse to fall; or if a public road, which a private individual was bound to repair, be so impassable as to delay another a *long* time in his journey, or compel him to take a circuitous route, then the latter may sustain an action for such particular damage; (h) and he may at the same time prosecute the offender by indictment for the public nuisance. (i) So some injuries are in their nature as well private as public, as assaults and batteries, libels on individuals, and forcible entries; and the party particularly injured may proceed by action, or he, or any other person, may indict the wrong-doer for breach of the peace; and in general the civil remedy for a private injury, also constituting a public *misdemeanor*, is not, as in cases of *felony*, even suspended.

Thirdly. The *occasion* upon which the supposed injury was committed should be considered, as it frequently, at least *prima facie*, legalizes or excuses the act, as in the case of slander in giving the character of a servant the libel is excusable, unless express malice be proved. (k)

Thirdly, The occasion of committing the injury.

(b) Styles, 347; 1 Lev. 247; Yelv. 89, 90; 1 Ld. Raym. 339. At least it is so as respects the death and *subsequent* loss of service, but it might be otherwise for the expense and *temporary* loss of service. Semble.

(c) Styles, 347.

(d) Id. *ibid.*; 17 Ves. 531.

(e) Styles, 347; Latch. 144; Sir W. Jones, 147; 1 Lev. 247; Bro. Ab. tit. Trespass.

(f) 12 East, 409.

•(g) 52 Geo. 3, c. 63, s. 5.

(h) *The Mayor and Burgesses of Lyme Regis v. Henley*, 3 Bar. & Adol. 77; *Chichester v. Lethbridge*, Willes' Rep. 71 to 75; 9 Moore, 489; 11 East, 60; 12 East, 432; see other cases, 3 Bla. C. 219, 220, note (6).

(i) Id. *ibid.*

(k) *Pattison v. Jones*, 8 Bar. & Cres. 578.

CHAP. I.
INJURIES, &c.

Fourthly. The intention of the wrong-doer.

PRIVATE INJURIES in particular.

Torts independently of contracts.

Fourthly. It may in some cases be necessary to prove a malicious or bad *intention*, as in an action for a malicious prosecution, and in some cases of slander. But in general when the act occasioning an injury is unlawful, the intent of the wrong-doer is immaterial. (*k*)

With respect to *private* injuries it is essential to consider what was the right affected, and then to ascertain whether the injury was a *tort* without contract, or a mere *breach of contract*, or of what other precise nature. If it were a mere *tort*, was it an immediate injury with *force* to a corporeal and tangible thing, so as to constitute a *trespas*s, and remediable as such; or was the injury to an incorporeal or nontangible matter, or indirect and without force and only consequential, or to property in remainder, and therefore remediable by another form of remedy, viz. an action on the *case*; (*l*) and was it a mere violation of a right by a party under no particular obligation, or was it the breach of a duty? Was it a nonfeasance, misfeasance, or malfeasance? These questions are of great importance, in many respects substantially so, and at least in regard to their governing the form of remedy. (*m*) Thus if B. illegally enter the house or land of A. with *actual force* and in a violent manner, such illegal entry would justify A. in immediately opposing force to force, and laying hands on him and turning him out without previous request; but if B. entered peaceably or to demand a debt, he must first be requested to depart, and if he refuse, then, although hands may be laid on him, yet this must be done *gently* (*molliter*), and no more force to push him out must be used than absolutely requisite. (*n*)

Torts, in their infinite varieties, affect the *person* absolutely or relatively, or *personal* or *real property*. To the *person* they are threats and menaces, assaults, batteries, wounding, mayhems; injuries to health, by nuisances or by medical malpractice; or affecting reputation, they are verbal slander, libels, and malicious prosecutions. Affecting personal liberty, they are false imprisonment and malicious prosecutions. To the relative right of a husband, they are abduction and harbouring, adultery or criminal conversation, and battery. Of a parent, abduction, seduction, and battery; and of a master, seduction, harbouring and battery of his apprentice or servant. And as they affect the right of the *inferior relation*, viz., as the wife, child, appren-

(*k*) 6 East, 464, 473; 2 East, R.107; 5 Esp. R.214; *Weaver v Ward*, Hob. 134; 1 Bing. 213; 1 Chit. Pl. 5 ed. 147, 148, 149.

(*l*) 9 Bar. & C. 591.

(*m*) See the distinction 1 Chitty on Pleading, 142 to 151.

(*n*) 2 Salk. 641; 8 T. R. 78, 357; *Ful-lay v. Reed*, per Park, J. 1 C. & P. 6, *post*.

tice, or servant; they are withholding conjugal rights, maintenance, wages, &c.

Injuries to *personal property* are the unlawful taking or detention thereof from the owner; and other injuries, are some damage affecting the same whilst in the claimant's possession or that of a third person, or injuries to his reversionary interest.

Injuries to *real property* are ousters, or turning or keeping the owner out of possession, trespasses to the owner's possession, nuisances to corporeal and incorporeal real property, waste, subtraction of rent, services, &c., disturbances of franchises, right of common, rights of way, or of pews, of tenure, and of patronage, &c.

It must further be considered whether the injury was *temporal*, or *ecclesiastical*, or *spiritual*. Thus, although the common law protects private reputation, yet *actions* are only sustainable when a verbal slander imputes an offence punishable in the temporal courts, and not a mere imputation of fornication, adultery, drunkenness, or other immorality, punishable only in the Spiritual Courts, unless it can be averred and proved that actual temporal damage, such as the loss of the society of one or more particular persons, has ensued. If such damage cannot be proved, then the calumniator must be proceeded against (within six calendar months) for correction in an Ecclesiastical Court, whose sentence is not, as supposed, mere *brutum fulmen*, and though not for damages is for corporal punishment and costs. So a married woman, though entitled to alimony and conjugal rights, cannot sue her husband at law, but must resort to an Ecclesiastical Court (*o*) or to an action at law in the name of her trustees, in case of a deed securing her money or a separate maintenance, (*p*) though probably deeds stipulating for separation would now be held void at law, even as to covenants with a trustee, according to the recent decision in the House of Lords. (*q*)

Torts are
temporal or
ecclesiastical.

If a *breach of contract* be complained of, then the nature of the contract must be considered, as whether it was of record, under seal, in writing, or merely verbal; and if the latter, whether it was an express or implied contract. The remedies, we shall find, principally depend on the form and mode in which the contracts were entered into. It must be ascertained whether there was any prior act (termed in law a *condition precedent*) to be performed by the party complaining, and whether any requisite tender, offer, request, or notice, or other step has

Branches of
contract.

(*o*) 27 G. 3, c. 44; 53 G. 3, c. 127; 3 Maule & Selw. 429.

(*p*) 9 Bar. & C. 67; 3 Dowl. & R. 570.

(*q*) *Westmeath v. Westmeath*, 1 Dow. Rep. New S. 519, and post next chapter.

CHAP. I.
INJURIES, &c.

been performed essential to establish that the party required to perform his contract *has* no excuse for his nonobservance.

Public injuries.

With respect to *public injuries* (usually denominated *crimes* and *offences*), they necessarily are as various as the public rights themselves, and even more so, for there is no limit to the perverted inventions of the malicious and the depraved in their unjust desire to injure others or to benefit themselves. All public offences or injuries may be classed under one of four heads, *treasons*, *felonies*, *misdemeanors*, and *offences*. (r) The former are certain offences against the King or state, and to which our present inquiries will not extend. The distinction between *petty treason* (viz. the killing of a husband, master, &c.) and ordinary murder, is now abolished. (s)

Felony, what.

Felon is a term of disputed origin, though probably derived from *fee* and *lon*, (*fee* signifying the fief, feud, or beneficiary estate, and *lon* meaning the price or value,) and signifying all crimes of so high a nature as to be punished, as heretofore the case, with the total loss of the *fee*, or estate, and its *value*; and to which, capital or other punishment may be superadded, according to the degree of guilt. (t) And when a statute declares that an offender guilty of any certain act shall be deemed to have *feloniously* committed it, it makes the offence a felony, and imposes all the common and ordinary consequences attending a felony. (u)

Misdemeanor.

The term *misdemeanor* means every offence inferior to felony, but punishable by *indictment* or by particular prescribed proceedings. (x)

Offence.

The term "*offence*" also may be considered as having the same meaning, (y) but is usually by itself understood to be a crime *not indictable* but punishable *summarily* or by the forfeiture of a *penalty*. If one statute make the doing an act *felonious*, and a subsequent act make it only *penal*, the latter is considered as a virtual *repeal* of the former. (z) These distinctions will be found highly important in their consequences. Private remedies are, in the case of *felonies*, suspended until after conviction or acquittal of the felon, but not so in general in the case of *misdemeanors* or minor *offences*.

Public offences are to the law of *Nations*; or against God or religion, morality or decency, as recognized by our own public

(r) See the several public treasons considered, 2 Chit. Crim. L. 60 to 122.

(s) 9 G. 4, c. 31, sect. 2.

(t) Sir H. Spelman and 4 Bla. Com. 94, 95.

(u) 3 M. & S. 556; 1 Hawk. c. 40, s. 5.

(x) Burn J. Misdemeanor; and see the *King v. Powell*, 2 Bar. & Adolp. 75, when the term misdemeanor, in the singular, may be taken as *nomen collectivum*, and including several offences.

(y) *Id. ibid.*

(z) 1 Hawk. c. 40, s. 5.

municipal laws; offences against the King, whether amounting to high treason, felony, or misdemeanor, or contempts of his government and prerogatives; offences against public justice, of various descriptions; against public peace, trade, health, and public police or economy; and offences against the positive enactments of a statute subjecting the party violating the regulation to a pecuniary penalty or punishment; all which in themselves are direct violations to rights strictly public.

Besides these are certain public *offences* more immediately affecting a *particular* individual, and constituting a *private* injury, but which, in respect of their bad example and tendency, are also considered to be public; such as those affecting the *person*, as homicide, which *directly* seems only to affect the party killed and his near relatives; other offences against the person of an individual, such as mayhems, abduction of an heiress or other female, rapes, unnatural crimes, assaults, batteries, woundings, and false imprisonment, libel, challenges and duels. Offences against *habitation*, as arson and burglary and riotous destruction; certain offences against private *personal* property, as larceny, embezzlement, false pretences and cheats, malicious mischief, forgery, and others. These, it will be observed, although directly and immediately more particularly injurious to one or more individuals, are, as breaches of the peace, and calculated to rouse and instigate men to revenge, and affording dangerous examples to others, therefore injurious in their consequences to society at large, and punishable as such. Some of these we shall find are *remediable* or rather *punishable* only by particular means, or in a particular course; and hence it is of great importance to ascertain the precise nature and classification of the *public* injuries or offences complained of.

We have seen that, with regard to private injuries, if a wrong be committed, the *intention* of the wrong-doer is seldom material. But with regard to *public* offences, it is in general otherwise, and the criminal *intention* frequently constitutes the *essence* or the *degree* of crime; thus homicide is murder, if committed maliciously, but if only occasioned by want of due care, it is only manslaughter. So seeming horse stealing or other larceny, will become at most trespass, if it appear that there was a total absence of felonious or criminal intent. (a)

With respect to *remedies*, they naturally follow the same order as rights and injuries, and it is essential, before the adop-

III. REMEDIES,
PRIVATE, OR
PUBLIC, in ge-
neral.

(a) *Rex v. Alexander and Davis*, Burn's J. tit. Horses, 262, 263, and tit. Larceny;

Rex v. Martin, 2 East's P. C. 618; 1 Leach, 171, S. C.

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tion of any remedy, well to ascertain the public or private, legal or equitable, or ecclesiastical properties and qualities, as well of the right as of the injury to which the remedy is to be applied.

Here we must distinguish between *private* remedies and those which are PUBLIC, and advert to the rules before noticed, viz. That for *mere public* injuries no individual can institute a *private* remedy, (b) although, by adopting a public criminal proceeding, he may frequently obtain private compensation, at least by leave of the Court, (c) and that where the right affected was merely *equitable*, an injury to it can in general be redressed only in a Court of *Equity*, and that ecclesiastical and spiritual injuries must be redressed in an Ecclesiastical Court. (d)

Remedies of
three descrip-
tions,
Preventive,
Compensatory,
or Punishments.

It will be found that for most injuries which more or less affect a *private* right and a *private* individual, (although often also affecting the public,) there are *three* descriptions of remedies or proceedings, and each of which again has its variety. The *first* are the *preventive*, or removing, or abating remedies, and which may be by acts of the party aggrieved, or by the intervention of legal proceedings; as in the case of injuries to the person, or to personal or real property, defence, resistance, recaption, abatement of nuisance, and surety to keep the peace, or injunction in equity, &c.: *secondly*, remedies for *compensation*, which may be either by acts of the party aggrieved, or summarily before justices, or by arbitration, or action, or suit at law, or in equity, or in an Ecclesiastical Court: and *thirdly*, proceedings for *punishment*, or mixed of compensation and punishment, and either summary before magistrates, or by indictment, or criminal information, ecclesiastical censure, &c. If the injury were an unlawful *capture* or seizure of that nature, or constituting a breach of international law, then no action can be sustained in a municipal court, but the proceeding for redress must be in the Prize Court of the Admiralty, or before commissioners specially constituted by the King. (e)

The wrong-doer in most cases of private injuries, (which also constitute *public offences*,) as batteries and libels, is liable both to an action at the suit of the party injured, and also to an indictment, (f) (though this is sometimes prohibited, (g)) and the Court in which the action is brought will not in general compel the plaintiff to elect, (h) though the Attorney-General may stay

(b) *Ante*, 10.

(c) *Post*.

(d) *Ante*, 7, 8.

(e) *Elphinstone v. Bedreechund*, Knapp's Rep. 316 to 361; and see *Hill v. Reardon*, 2 Sim. & Stu. 431; but see 2 Russ. R. 608, *ante*, 2, note (b).

(f) Hawk. P. C. c. 62, s. 4.

(g) 7 & 8 Geo. 4, c. 29, s. 70; *Id.* c. 50, s. 36; 9 Geo. 4, c. 31, s. 28; 1 & 2 W. 4, c. 32, s. 46.

(h) 1 Bos. & Pul. 191.

the public prosecution. (*i*) But a court and jury will in general consider the double proceeding vexatious, and the latter in that case will seldom give large damages.

In some cases of public offences, but which have more immediately injured a private individual, as batteries and libels, if the public remedy by prosecution be adopted, the court will sometimes permit a reference, (*k*) or allow the defendant, even after conviction, to *speak* (as it is termed) with the prosecutor before any judgment is pronounced, and a trivial punishment (generally a fine of a shilling) will be inflicted, if the prosecutor declare himself satisfied, or if, in other words, an adequate apology or compensation has been made; (*l*) and where the defendant was convicted on an indictment for ill treating a parish apprentice, and at the recommendation of the Court of Quarter Sessions gave security for the fair expenses of the prosecution, upon an understanding that the court would abate the period of his imprisonment, the security was held to be legal and binding. (*m*) So upon summary proceedings before a magistrate, (as for petty larcenies or injuries to personal or real property,) he is sometimes authorized to discharge the offender from a conviction, upon his making such satisfaction to the party aggrieved for damages and costs, or either, as shall be ascertained by the justice. (*n*) But it should seem that this permission does not extend to felonies. (*o*) By leave, therefore, of the court, some public prosecutions may be allowed to enforce civil compensations for the private injury. But it should seem that a *compromise* of an indictment for a *public* misdemeanor and private satisfaction cannot take place without the sanction of the court, (*p*) and that the same rule would extend to an indictment for a common battery or libel. (*q*) But at least a bond conditioned to *discontinue* a public nuisance is valid. (*r*)

By the ancient common law, and by the oldest statutes, remedies were divided and distinguished as *private* or *public*, and

When private compensation is obtainable by compromising a public prosecution.

The occasion for, and introduction of, summary proceedings.

(*i*) Burn's J. tit. Nolle Prosequi.

(*k*) See *post*, and Burn's J. tit. Award; 1 J. B. Moore, 120; 7 Taunt. 422; 9 East, 497.

(*l*) 4 Bla. C. 363, 4; 1 Moore, 120. See *Elworthy v. Bird*, 2 Sim. & Stu. 372. But see 1 Dow. Rep. New S. 519, overruling that case as to the effect of a covenant between husband and wife to separate.

(*m*) 11 East, 46.

(*n*) 7 & 8 Geo. 4, c. 29, s. 63; and chap. 30, s. 31.

(*o*) *Elworthy v. Bird*, 2 Sim. & Stu. 372.

(*p*) 5 East, 294; 1 Smith, 515; Burn's J. 26 ed. tit. Award.

(*q*) *Rea v. Rant*, Kyd on Awards, 64; and see 2 Bing. 258; McClell. R. 69; 2 Dowl. & Ry. 265; 7 Taunt. 422; *sed quære*, see *Elworthy v. Bird*, 2 Sim. & Stu. 372; that an indictment for a misdemeanor may be compromised, though not an indictment for felony, *Westmeath v. Westmeath*, 1 Jac. Rep. 126. where specific performance of an agreement for separation of husband and wife was decreed, though the agreement provided for the compromise of an indictment for an assault.

(*r*) 7 T. R. 475.

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each were either at law or in equity, or *ecclesiastical* or *spiritual*. The first were to be pursued in the temporal common law civil courts; the second in the public criminal courts; the third in courts of equity; and the fourth and fifth in certain ecclesiastical or spiritual courts. Formerly, the trial or investigation of private remedies in the common law courts, and of public crimes and offences in criminal courts, were principally, if not entirely, by *jury*; then considered the only constitutional mode of investigating disputed facts. But as society enlarged, and the expenses of litigation increased, innovations were gradually introduced on that mode of deciding upon facts. Inferior Courts of Requests (commonly termed Courts of Conscience) were instituted for the purpose of determining small debts, where the claimant is allowed to substantiate his demand by his own oath; and in cases of petty offences and misdemeanors, a most extensive jurisdiction has been gradually given and extended to magistrates and others, enabling them to decide upon facts civil as well as criminal, which must in former times have been determined by a jury, and in superior courts. But now, justices, who, by the terms of their commission, formerly had jurisdiction only over *crimes* and breaches of the *peace*, have, in almost all cases of petty offences and torts, unconnected with contract, (and, indeed, in some cases even of *contract* of an inferior nature, as between masters and apprentices and masters and servants in certain trades, and between members of friendly societies, and in fixing the amount of salvage, &c) been invested with jurisdiction quite foreign to their original institution, and they have been clothed with powers to hear and determine, combining the several functions and powers of a judge and jury and a court of equity. So that summary jurisdiction without trial by jury is now extended to almost every small injury or dispute that can usually arise between members of society. On the one hand, this is great saving of expense to parties, but upon the other, magistrates are invested with jurisdiction which might, in some cases, be very injuriously exercised.

I. PRIVATE
REMEDIES.
General rules.

Keeping in view these extensions and introductions of new remedies, we will now proceed to state the general rules which affect the ancient as well as modern remedies for *private injuries*, strictly so called, and those which, though nominally public, yet more particularly affect one or more individuals, and which may be resorted to by them in lieu of a civil remedy.

It is a general rule that when the right and injury were merely *private*, then no one can interfere or seek or prosecute a remedy but the party immediately injured; nor can others,

excepting professional advisers, instigate or encourage their prosecution, without being guilty of the offence of barrettry, or maintenance, or champetry.^(s) But on the other hand, if the remedy be even *nominally public*, and prosecuted in the name of the King, then *any one*, though not privately injured, may institute or continue the prosecution.^(t)

Private remedies are either *by act of the party, or by legal proceedings, to prevent* the commission or repetition of an injury, or to *remove* it; or they more frequently are to recover, by summary proceeding, or by action or suit, *compensation* for the completion of an injury.

The *preventive* remedies are more numerous than usually supposed, but they are not so frequently resorted to as might be advisable,^(u) which may be attributed to the ignorance of their existence until it is too late to resort to them, or to the hazard of their being mistaken, and subjecting the party to an action for his irregularity, or to the preference given to a more formal and expensive proceeding.

First. Preventive and removing Remedies.

First. By party's own act.

It has been frequently observed, that "*Laws for prevention are better than laws for punishment.*"^(x) The *preventive* and *removing* remedies are principally of two descriptions, viz. *first, those by act of the party himself*, or of certain relations or third persons permitted to interfere, as with respect to the *person*, by self-defence, resistance, escape, rescue, and even prison breaking, in case of imprisonment clearly illegal; or in case of *personal property*, by resistance or re-capture; or in case of *real property*, by resistance or turning a trespasser out of his house or off his land, even with force;^(y) or by apprehending the wrong-doer, or by re-entry and regaining possession, taking care not to commit a forcible entry or breach of the peace;^(z) or in case of nuisances, private or public, by abatement;^(a) or remedies by distress for damage feasant, or for rent, or for heriot, &c., or by set-off or retainer. By these and various other remedies, in which a party, as it is vulgarly termed, takes the law into his own hands, he may frequently avoid proceeding by action, which, especially in the instance of actions of ejectment, are too frequently unnecessarily resorted to.^(b)

(s) 4 Bla. C. 134, 5. 13 b.

(t) 1 Salk. 174; 1 Atk. 221; 3 M. & Sel. 71.

(u) *Ante*, Preface.

(x) See *Wilcock v. Windon*, 3 Bar. & Adol. 43; and *Tencgan v. Attwood and others*, 1 Mod. 202.

(y) 2 Salk. 641; Co. Lit. 257; 1 Saund. 81, 140, note 4; 8 T. R. 78, 357.

(z) *Id. ibid.*

(a) 2 Smith's R. 9,

(b) See 1 Bing. R. 158; 1 Man. & Ry. 220; 7 T. R. 431; 1 Price, 53; 3 Bing. 11.

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It has been properly suggested that there is frequently danger in persons availing themselves of remedies *by their own act*, because, by mistake or otherwise, they by so acting may expose themselves to the risk of being subject to an action for irregularity. This risk, however, is in a great measure provided for by modern acts requiring notice of action before they can be sued, and enabling them to tender amends, or even to pay the amount into court, in case a tender before action has not been made. Thus the modern acts against larceny and petty offences of that nature, and against wilful or malicious injuries to personal and real property, enable the owner of the property, or his servant, or any other person authorized by him, to apprehend the person *found committing* any offence punishable by indictment or summary conviction by virtue of the acts; and it is enacted, that all persons acting in *pursuance* of the acts, (and which term is construed to mean *bonâ fide* acting under colour thereof, though erring by mistake, (c)) shall have notice of action, and may tender sufficient amends, or pay the same into court; (d) and the game act contains a similar enactment; (e) consequently there is not much risk of expensive litigation by a party thus acting for himself.

There is, however, one general caution to be observed before the adoption of some of these remedies *by act of the party*, that a party who has availed himself of such summary proceeding cannot *also* afterwards proceed by action. Thus, if a party abate a nuisance by his own act, and without waiting the judgment of law *quod prostrnavit*, he is not entitled also to proceed by an action, (f) for although he hath his choice of two remedies, either by abating it himself by his own mere act and authority, or by suit, in which he may both recover damages and remove it by the aid of the law, he hath not both, and having made his election of one, he is totally precluded from resorting to the other. (g) Hence it should seem that when a party has already sustained any considerable damage worth suing for, it is better to proceed by action for compensation than to abate the nuisance. (h)

(c) See *post*, 4 T. R. 556.

(d) 7 & 8 Geo. 4, c. 29 & 30; and 9 Bar. & Cres. 806.

(e) 1 & 2 W. 4, c. 32, s. 47; see decisions on these acts, *post*, ch. vii.

(f) 9 Coke Rep. 55; 3 Bla. C. 219, 220.

(g) *Id.* *ibid.*

(h) *Id.* *ibid.* It will be observed that

a person may proceed in a court of equity by bill for an injunction, and yet afterwards sustain an action for damages previously sustained; *post*, ch. viii. So after a person has obtained his release from illegal imprisonment by habeas corpus, he may sue a magistrate for the trespass; *Ex parte Hill*, 3 Car. & P. 225.

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The second description of *preventive remedies* are those which are obtained by some *legal assistance*; as by calling in a peace officer, by obtaining a warrant and security to prevent a duel, by application to a magistrate for security to keep the peace (i), or by application to the Court of King's Bench for the like purpose, or by obtaining a writ of habeas corpus; or by filing a bill and obtaining an injunction to prevent a nuisance, or a piracy of a copyright or other invention, or to prevent waste; and by writ of *ne exeat regno* to prevent a person who owes an equitable debt from getting out of the jurisdiction and eluding justice; and bills for specific performance of certain contracts, or to secure a due administration of assets among legatees, &c.

Secondly. Preventive remedies by legal assistance.

All these *preventive* or specific remedies, so calculated to anticipate and prevent loss, and to diminish litigation, we will hereafter very fully consider, because they are most essential to *speedy justice*.

Supposing the injury to be complete or continuing, then the remedies to obtain *compensation*, either *specific* or in *damages*, are to be considered. These are by arbitration; or are summary, before justices or others; or are formal, whether by action or suit in inferior or superior Courts of Law, or Equity, or Ecclesiastical, or Spiritual, or of Admiralty.

Secondly. Remedies for Compensation either specific or in damages.

Some modern acts, as those relating to *Friendly Societies* and to *servants* in certain trades, are *compulsory* on parties to refer their disputes to *arbitration*, as being of too small value to justify the trouble or expense of a formal suit or trial. (k) Here the parties have *voluntarily* placed themselves in the situation or character to which the statutory regulation applies, and they must have anticipated that such mode of settling any difference must be resorted to. It has recently been attempted to introduce a power of compelling all persons to refer certain matters of account to arbitration, when unfit to be tried by a jury, but the measure has not yet passed into law. It should seem that some restraint should be imposed upon obstinate parties who will assert their right to have tried in a superior court all the items of a long and intricate account, and which would frequently occupy several whole days, which, in the due and ordinary distribution of justice, ought to be divided amongst several suitors, and which account ought more properly to be investigated in a Master's office of a Court of Equity, or before an

Remedy by compulsory arbitration.

(i) Burn's J. Surety, Peace.

(k) 9 Geo. 4, c. 92, as to Friendly So-

cieties; *Crisp v. Bunbury*, 8 Bing. 394; and as to servants see 5 G. 4, c. 96.

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arbitrator, (*l*) or in an action of account before auditors. (*m*) Attempts have been made at Nisi Prius to prevent such an inconvenient trial at law; (*n*) but the party still has a strict legal right to insist upon it, (*o*) though in general it would be most unwise to try the question so adversely to the feelings of the judge and jury.

Summary remedies by legal assistance.

The remedies by the intervention of legal authority are frequently *summary*. Thus the party may regain possession by applying to magistrates under the statutes against forcible entries and detainers. (*p*) Or he may obtain summarily before justices punishment or compensation for petty or common assaults and batteries, (*q*) for which the offender may be fined 5*l*. to be paid in aid of the county rate; and for petty larcenies and for small and wilful or malicious trespasses and injuries to personal or real property, for which also 5*l*. may be imposed; (*r*) or for entering land to kill game without authority, or for laying poison to kill game; (*s*) or to justices for recovery of penalties for other small injuries and offences. (*t*)

Thus in case of a *common* assault and battery, not accompanied with any attempt to commit a felony, nor upon which title to land, or bankruptcy, or insolvency, or legality of an execution shall come in question, two justices are expressly authorized to convict in a fine of 5*l*., to be paid in aid of the county rate; but the justices' certificate of the proceedings is to be a bar to any action or indictment for such assault and battery. (*u*)

So in cases of *petty takings of personal or real property* not amounting to an indictable felony or misdemeanor, (*v*) or for *wilful or malicious injuries to personal or real property* when not felonious (*x*), two or sometimes one justice may convict and award damages to the party aggrieved, and a penalty in aid of the county rate; (*y*) excepting that when the conviction has proceeded on the evidence of the party injured, then the sum he

(*l*) 2 Camp. 238; Eq. Cases Ab. 5; 7 Ves. 588; but when not so, 2 Young & Jervis, 35.

(*m*) 2 Chitty R. 10; 3 Dowl. & R. 596.

(*n*) 2 Camp. 238; Tidd, 9th ed. 2, note (*a*).

(*o*) 5 Taunt. 431, 432; 1 Marsh. 115; 2 Young & J. 33.

(*p*) Burn's J. tit. Forcible Entry and Detainer.

(*q*) 9 Geo. 4, c. 31, s. 27.

(*r*) 7 & 8 G. 4, c. 30.

(*s*) 1 & 2 W. 4, c. 32.

(*t*) Burn's Justice, per tot.

(*u*) 9 Geo. 4, c. 31, sect 27, 28, 29. As no part of the 5*l*. is to be paid to the party

aggrieved, it will be observed that a party seeking *pecuniary* satisfaction must still proceed by *action* at the risk of his not obtaining a verdict for 40*s*. damages, and of the judge declining to certify. There seems no reason why two justices should not have power of awarding private satisfaction for a battery, when proved by a *third* person's evidence or admission, as in small injuries to *personal* or *real property*, where a single justice has express power to award *private* satisfaction, under 7 & 8 G. 4, c. 29 & 30.

(*v*) 7 & 8 Geo. 4, c. 29, s. 65.

(*x*) Id. c. 30, s. 24, 32.

(*y*) See notes (*v*) and (*x*).

would otherwise receive is to be applied as the penalty. But a justice has power, upon the first conviction for such petty taking, or injury to personal or real property, to discharge the offender, upon his making such satisfaction to the party aggrieved, for damages and costs, or either of them, as shall be ascertained by the justice. (z) So the recent *game act* contains provisions, not only for apprehending but for fining persons to the extent of 5*l.* for trespassing in pursuit of game, to be paid in aid of the county rate; (a) but it is provided, that although the party injured by the trespass shall have the option of proceeding by action, yet there shall be no double proceeding, and that if he institute or concur in the proceeding for the penalty, he shall not also sue. (b) In general, upon these summary proceedings before magistrates, costs are recoverable, but in case the penalty amounts to 5*l.*, then the costs are to be deducted from it. (c)

These and similar enactments, as far as regard small injuries to the person, or personal or real property, and petty trespasses, will be preferable to actions, unless the damages are very considerable. They do not absolutely take away the common law right of action, but they give the party injured the *option* of obtaining compensation, or, for assaults upon the person, punishment for such small injuries by summary proceedings, supported by his own testimony, instead of having recourse to a trial by jury of an expensive action or prosecution for small damages or injuries, subject to the risk of not recovering a sum sufficient to enable him to obtain costs; and no respectable or prudent attorney or solicitor would hazard the rebuke of a judge, upon the trial of a trifling action, for encouraging or allowing his client to bring an action for a petty demand, which ought to have been proceeded for elsewhere (d).

(z) 7 & 8 G. 4, c. 29, s. 68, and chap. 30, s. 34.

(a) 1 & 2 W. 4, c. 32, s. 30, 31.

(b) *Id.* s. 46.

(c) 18 Gco. 3; see Burn's J. tit. Costs.

(d) Perhaps the principle of these enactments might be advantageously extended to verbal and even written slander, and to common assaults and batteries, and torts occasioning small damages, such as injuries by irregularities in making or conducting a distress for rent; and indeed to all cases of small injuries where no *permanent* right is to be tried, and to all cases where a party injured would be content to receive a small compensation rather than hazard an expensive suit in a superior court. Such an enactment would prevent numerous trifling actions in the superior courts, the

expense of which is very unequal to the sum actually recovered.

It seems at least expedient to provide a summary *remedy* for *verbal slander*, which would prevent many trifling actions. Such actions are repressed by the statutes depriving the plaintiff of more costs than damages, when the jury find a verdict for less than 40*s.* damages; and juries are not favourable to such actions, unless there be proof of actual damage beyond 40*s.*, and consequently much of the valuable time of the superior courts of justice is occupied in trying them, and the result is ruinous to both parties; and yet parties are either induced to *revenge* themselves or to clear their characters from the imputation by risking an action.

It should seem that a summary remedy

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Remedies by
formal proceed-
ings in the
superior and
other courts.

If the injury has been considerable, and worth the expense of a formal proceeding in a superior court, then if it affected a *legal right*, the remedy is in general by *action* in a *Court of Law*; but if to an *equitable right*, or if it will be better investigated in a *Court of Equity*, then the remedy is by *bill*; or supposing a debtor has become a bankrupt, then the proceedings are to be before assignees, or commissioners, or in the *Court of Review*; (e) or if he have become an insolvent debtor, then the proceeding is to be in the *Insolvent Court*. (f) If the injury relate entirely to an ecclesiastical or spiritual offence, not cognizable in the Temporal Courts; as fornication, or slander, imputing a spiritual offence, then recourse must be had to an *Ecclesiastical Court*. (g) So in the case of a married woman, she must proceed in that Court for alimony or restitution of conjugal rights. We merely here advert to these several modes of redress, to show their infinite variety. In a subsequent chapter a concise outline of the present jurisdiction of justices and of all the courts will be given, in order to show before what forum redress should be sought.

It will be observed that the ancient *common law* rights and remedies were comparatively few and simple and readily divided and enumerated; but in the progress of time the occasions of society have led, especially of late, to an accumulation of new statutory regulations, which have either better defined or modified or regulated what were *previously* partially recognized by the common law, or have actually *created* new rights or imposed new duties and penalties for their non-observance; we speak not merely of public regulations of police, but refer also to those of a private nature.

might be as well provided in these cases. In *Harrison v. Thornborough*, Hil. T. 12 Ann. Gilb. cases, L. & E. 117, Parker, C.J. said he remembered a saying of Treby, Chief Justice, that *people should not be discouraged that put their trust in the law, for if men could not have a remedy at law for such slanders, they would be apt to carve it for themselves, which would let in all the ill consequences of private revenge*; and Powys, Justice, said, that the latter judgments had been right in denying the rule of taking words in *mitiori sensu*, because it left a liberty for men to defame others, provided they did it with a little caution; and it had been known that people had taken advice of counsel upon a sheet of paper full of scandalous words, in order to know which they might "out" with safety.

The legislature have already, in some instances, given magistrates summary jurisdiction in case of *verbal abuse*, as in the stage coach act, 2 & 3 W. 4, c. 120, s. 47, 99, which enacts that if the driver or guard of a

stage coach assault or use "*abusive or insulting language*" to any passenger, he shall forfeit 5l. and may be convicted by *one justice*. A magistrate at one of the London police offices lately fined a stage coachman (who had during the journey been guilty of incivility to a passenger, and who therefore refused to give him any thing for himself,) in 40s., for saying, in the presence of the other passengers, "*Gentlemen* always give me something," insinuating by his tone and manner that the passenger was not a gentleman. Why might not magistrates have a similar but modified power over common slander as over petty assaults and batteries and injuries to personal and real property? See 9 G. 4, c. 31, s. 27, 28, 29; or even power to compel private satisfaction, as in 7 & 8 G. 4, c. 29 & 30.

(e) 1 & 2 W. 4, c. 56.

(f) 7 G. 4, c. 57.

(g) Limited by 27 G. 3, c. 44, s. 1, 2, to eight and six calendar months.

Of the particu-
lar rights and
remedies
introduced by
statute.

It follows, that from the introduction of these *new rights* and *duties* by numerous statutes, that a great variety of *new injuries* and *offences* must arise from the infraction or non-observance of such new rights and duties; these require *new remedies*, to prevent, or remove, or compensate, or punish.

In some cases, where *new rights* or *duties* have been created, the statutes introducing them have been silent with regard to the remedies for their infraction. When this is the case, the law *impliedly* gives an appropriate remedy. Thus if a new *private* right be created or recognized, the law *implies* a remedy, as *by action on the case*, where the damages for the infraction of the right are uncertain, (*h*) as for removing goods under an execution without paying a year's rent; (*i*) and by action of *debt* where the sum is in its nature certain or readily ascertained. (*k*) And where the damages or penalties are recoverable by a person particularly aggrieved, as by a corporation, to whom the latter is given, costs also are recoverable; (*l*) so treble the value of tithes when not set out in kind, or even treble damages, incurred by extorting money, are recoverable in *debt*. (*m*) In general, however, the same act that creates or modifies the right or duty, *prescribes* the remuneration, penalty, or punishment, and even the form of the remedy; and gives the same either to the party injured, or to a common informer, or to the king. (*n*) As to the party aggrieved, an action of *debt* for an escape out of execution, (*o*) or the same form of remedy for double yearly value, for not quitting, in pursuance of a notice to quit from a landlord to his tenant. (*p*) And whenever a statute, introducing a new right or duty, prescribes a *particular* remedy, no other can be adopted; (*q*) therefore, no *action* will lie for a poor rate, or for composition money duly assessed under the highway act, the remedy by distress being prescribed in those cases by statute. (*r*) When, however, a statute gives a remedy in the affirmative, without a negative expressed or implied, for a matter which was actionable by the common law, the statute remedy is considered as *cumulative*, and the party may sue at common law or upon the statute, and

(*h*) Com. Dig. tit. Statute, A. F. and tit. Pleader, II. s. 1, 2, 20; 10 Coke, 75, b.; 2 Inst. 486; 2 Salk. 451.

(*i*) 8 Ann. c. 14; Dougl. 665; 1 Chit. Pl. 263, 264.

(*k*) 1 Chit. Pl. 127; 1 Rol. Ab. 598; 1 M'Clel. & Y. 457; 4 B. & C. 962; 9 B. & C. 524.

(*l*) 9 Bar. & C. 524; or, if an acquitted defendant is entitled to costs, under 4 Jac. 1, c. 3, then debt lies for the same, *id.* *ibid.*

(*m*) 2 Bla. R. 1102.

(*n*) A common informer cannot sue for a penalty, unless he be expressly or impliedly authorized so to do, 5 East, 313.

(*o*) Rich. 2, c. 12; 1 Saund. 34, 39, 218.

(*p*) 4 G. 2, c. 28, s. 1; 1 New R. 174.

(*q*) 10 Bar. & C. 546; 2 Burr. 1157; 1 M'Clel. & Y. 450.

(*r*) *Id.* *ibid.*

CHAP. I.
REMEDIES.

sometimes both. (s) So if a statute be *prohibitory* or *injunctive* in one clause, and in another distinct clause enact a particular penalty, the offender may be prosecuted at common law, either for the disobedience of the first clause, or upon the statute for the penalty. Thus disobedience of an order of justices is an offence indictable at common law, though a specific penalty be provided by some particular statute for the neglect of that duty which the order is intended to enforce; (t) and therefore, although the prescribed statutory penalty for disobeying an order upon a parent for maintenance of his children, is only twenty shillings per month, yet by indicting at common law for disobedience of the order, punishment, and probably maintenance to the full and proper extent, may be enforced. (u)

In some cases we shall find that the *common law* remedy is *altered* by a statute. Thus the common law remedy of trespass against a magistrate is taken away by 43 Geo. 3, c. 141, where a conviction has been quashed, and the action must be trespass *on the case*, alleging and proving that the magistrate acted maliciously, and without any reasonable cause. (x)

How far the recovery of costs is to be considered in adopting a legal remedy in general.

Before the adoption of any remedy by *legal interference*, whether summary or more formal, it is essential to consider what will probably be the sum or *damages recovered*, and whether any and what *costs* will be recovered, and consequently whether it is worth while to adopt any remedy. At common law *no costs* were recoverable, and the statute of Gloucester gives costs only where *damages* are recovered, (y) and this extends to a *penalty* recoverable by a *party grieved*, because he is also entitled to *damages* for detaining the penalty and consequently costs. (z) But where a common informer is entitled to a penalty, he is not entitled to damages, and consequently has no costs, unless expressly given. (a)

The right to costs was qualified by statute 43 Eliz. c. 6, enabling a judge to certify, so as to take away costs in *any* action whatever, whether upon a contract or for a tort, if the plaintiff did not recover a verdict for forty shillings; (b) and as judges

(s) Com. Dig. Action upon Stat. C.

(t) 2 Burr. 799; 4 Dougl. 333, 388; 4 T. R. 205; 8 East, 41; 3 M. & S. 62.

(u) 43 Eliz. c. 2; 2 Burr. 799; 1 Eln. C. 448, note 3; *sed quare* as to the impropriety of any extension of this rule authorizing a discretionary punishment, perhaps beyond the measure of that prescribed and intended by the legislature.

(x) 12 East, 67; 16 East, 13; 5 Taunt. 580. This was a singular enactment, unnecessarily violating the general rules and forms of actions. It would have been bet-

ter to have let the old form of action remain, and to have enacted that the defendant should be acquitted, if it should appear that he had acted upon probable cause and without malice.

(y) 6 Edw. 1, c. 1; 2 Inst. 238; Hardw. 152.

(z) Willes, 440; 9 B. & C. 666

(a) 1 Salk. 206.

(b) 2 Wils. 258; 2 New R. 471; 5 Bar. & Ald. 796; 1 Dow. & R. 413; 9 Price, 314; 10 B. & C. 492.

were reluctant actively to exercise that power, subsequent acts were passed absolutely depriving the plaintiff of more costs than damages, if he recovered less than forty shillings in certain particular actions, as in actions for assault and battery, or for trespass to land, (c) unless the judge certified that a battery was proved, or that the freehold came in question; (d) and in an action for verbal slander no costs are recoverable, when the damages are under forty shillings, whether or not the defendant plead a justification; (e) and in an action for treble the value of tithes not set out, the plaintiff is not entitled to costs, unless the single value found by the jury *do not* exceed twenty nobles, that is, 6*l.* 13*s.* 4*d.*, (f) the legislature at that time considering that when the treble value exceeded 20*l.* the sum recovered would be quite sufficient to enable the plaintiff to pay his own costs, (f) and various other statutes have a similar operation.

Other acts, giving jurisdiction to numerous local Courts of *Request* or *Conscience*, as they are termed, in cases of common *debts*, some for 10*l.*, others for 5*l.*, and others 2*l.* enact, that if the action be improperly brought in a superior court, the plaintiff shall not recover at all, unless he establish a claim to a larger extent, or shall not recover costs.

The operation and application to each particular case of all these acts, must necessarily be considered, because they should influence every prudent person in the choice of his remedy, as it would obviously be most imprudent to commence an action in a superior court, where the debt or damages to be recovered will probably be so small as not to entitle the plaintiff to recover his full costs. And if he should be so entitled, it should also be considered that in the present mode of taxing or ascertaining the amount of costs, expenditure, although prudently incurred in obtaining advice, or in consultations and otherwise, is disallowed, and which consequently he must bear without any return; and that even when *treble costs* are given by statute, they are singularly construed only to mean the aggregate of, 1st, the usual taxed costs; 2d, half thereof; and 3rd, half the latter; (g) so that in effect the treble costs amount only to the taxed costs, and three-fourths thereof, and frequently such aggregate does not cover the whole actual expenditure. The *treble damages*

(c) 22 & 23 Car. 2, c. 9, sect. 136; 1 Young & J. 360; 7 J. B. Moore, 269; 6 Bing. 530.

(d) *Id.* *ibid.*

(e) 21 Jac. 1, c. 16; 4 East, 567.

(f) 8 & 9 W. 3, c. 11, s. 3; 1 Hen. Bla. 107, 8. But full costs are recoverable

in a *suit* in the Exchequer for tithes, unless there has been a previous adequate tender, 2 Madd. Ch. R. 556, 557. Therefore, if the treble value would not be much more than 20*l.* a suit there is better than an action.

(g) 1 Chit. R. 157; Tidd, 3 ed. 1025.

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REMEDIES.

are more liberally construed to mean actually treble the single damages. Thus, if the jury give 20*l.* damages for a forcible entry, the court will award 40*l.* more. (*h*)

But the legislature, at the same time that they have discouraged actions for small debts and damages in the *superior courts*, have in many cases considered, especially in recent enactments, that a person ought not in such cases to be deprived of proper remedy *elsewhere*, for, as observed by Lord Kenyon, a party, whose claim is under forty shillings, but who cannot recover it in the County Court, ought not therefore to be without remedy; (*i*) and if a man be assaulted, and sustain damages under forty shillings, yet, as he cannot sue for a *trespass vi et armis* in the County Court, his remedy elsewhere should not be discouraged, for, otherwise, men will be driven to revenge themselves; (*k*) and, therefore, the modern principle of legislation has been in general to afford *summary* remedies for small debts, and some torts occasioning small damage. (*l*)

II. PUBLIC RE-
MEDIES.

With respect to *public remedies*, it might seem that the consideration of them is foreign to a work professing to treat of private rights, injuries, and remedies. But (especially of late) proceedings of a public and criminal nature, in very many cases, are intended to have, and in effect actually have a *double operation*, as well to *prevent* the commission of similar offences by others, as to afford future security and compensation, or satisfaction, either pecuniary or otherwise, to the private individual who has been more immediately and particularly injured by the offence; and hence the consideration of such public remedies is here essential.

We must, however, remember, that the primary object of all prosecutions and of all punishments, is the protection of society from danger of the repetition of offences, and from the bad effects of example if they should remain unpunished; and that the object of *punishment* is either the *amendment* of the offender, or the depriving him of the means of future offence, or deterring others by the dread of similar punishment from offending in the like way. (*m*) The *measure* of *punishment*, with these views, is one of the most difficult subjects of legislation; and hence the fluctuation, or rather *variation*, in the degrees of punishment at different times, according to the increase or decrease of particular crimes, and the necessity for the change

(*h*) 4 B. & C. 154; M'Clel. Rep. 567.

(*i*) 1 Dowl. & R. 359; 2 Hen. Bla. 29.

(*k*) Gilb. Cases, L. & E. 117; *ante*, 24.

(*l*) *Ante*, 22.

(*m*) 4 Bla. C. 11, 12, 251, 252.

of punishment, or its degree. (n) The modern policy and recent enactments are greatly in favour of humanity. (o)

CHAP. I.
REMEDIES.

For offences of a public nature, *any one*, though not privately or particularly affected, may be the accuser and prosecutor on behalf of the king or public; and even in the case of a prosecution for a libel or assault, or other injury of a private nature, but tending to a breach of the peace, although the original prosecutor who was injured die, any person may *continue* such prosecution. (p) And several persons may legally associate and contribute towards the expense of prosecuting persons supposed to have been guilty of crime; (q) and so far has this doctrine been carried in its construction for the benefit of public justice, that even an individual, who has, for the purpose of detecting a suspicious person, afforded him an opportunity to commit a particular crime, or even induced the commission of it, is not thereby precluded from becoming a prosecutor, and instituting proceedings against him, (r) unless where a particular offence be destroyed by the consent of the party indicting: as in the instance of a concerted robbery, where it is essential that alarm should be excited; and, therefore, if a plot be deliberately laid to detect a supposed offender, no such offence has in fact been committed. (s) So, persons injured by an assault, libel, or other offence of a private nature, may (and should, if their own evidence will be material,) become the prosecutor instead of suing; and, indeed, criminal charges of that private nature are seldom proceeded for, excepting by the party injured. But in all these cases, it must be kept in view, that *revenge* ought not to be the motive; and, if it should be detected or inferible, and the prosecution fail, and there was no reasonable ground for instituting it, the prosecutor will be justly exposed to an action at the suit of the acquitted defendant, and probably have to pay considerable damages. (t) The true object of *criminal remedies* is not vengeance for the past, but security for the future. And to the furtherance of

(n) 4 Bla. C. 13, 14, &c.

(o) The punishment of death is now rarely inflicted, and is taken away in some cases, before punishable capitally, by recent acts, (2 & 3 W. 4, c. 62,) even in the case of forgery, except of a will and certain powers of attorney, (2 & 3 W. 4, c. 123); and real estates are only forfeited during the life of the offender, and afterwards descend to his heir.

(p) 1 Wils. R. 222; 2 Taunt. 334; 2 Bos. & Pul. 508; 2 Leach, 912, 1019,

1033; Russ. & Ry. 160; 1 Atk. 221.

(q) 1 Salk. 174; 3 M. & S. 71.

(r) 2 Taunt. 334; 2 Bos. & Pul. 508; Russ. & Ry. 160; 2 Leach, 912, 1019, 1033.

(s) 2 Taunt. 334; 2 Bos. & Pul. 503; Russ. & R. 160; 2 Leach, 616, 912, 1019, 1033;

(t) See Lord Mansfield's observations on the proceedings by appeal, 5 Burr. 2643; 2 Woodes, 565, &c.; 1 Chit. Crim. L. 3, note (a); 4 Bla. C. 312 to 315.

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REMEDIES.

that design every man is bound to contribute. It will be observed, that in most of the modern acts which enable magistrates to convict and fine an offender, it is enacted, that when the conviction proceeds on the evidence of the party aggrieved, he shall not have any part of the fine or penalty, so that any pecuniary motive for perjury is removed; (*u*) and for the same reason, no part of the five-pound penalty, upon conviction of a common assault or battery, is payable to the party aggrieved, but the whole is to be paid towards the county rate; so that he must institute a summary proceeding merely with a view to *punishment*, or to repress similar aggressions, and not for pecuniary compensation; and the magistrate has not, as in cases of small injuries to *property*, any power to discharge the conviction, upon the offender making satisfaction to the party aggrieved. (*x*) In these cases it should seem, that there would be no objection to the recovery by the same means of civil compensation, at least when the party aggrieved has not himself proved his own case, the fine or penalty in such case would not only operate as a punishment, but the awarding small compensation would save the necessity for any action to recover damages for the private injury. (*y*)

As in cases of *private* injuries, so in regard to *criminal remedies*, many strong proceedings may be had to *prevent* the completion, or continuance, or repetition of a crime, by the acts of any individual. Thus, the commission of a felony with force may be prevented even by *killing* the offender, when other means would not be effectual, though such a mode of resistance should not be resorted to without occasion, and would amount at least to criminal manslaughter if unnecessary, or the felony was attempted without force, as when the offender was merely picking a pocket. (*z*) Persons in the act of committing larceny, or petty thefts, or takings, (*a*) or wilful or malicious injuries to personal or real property, (*b*) or trespassing in pursuit of game and refusing to give his name, (*c*) and various other offenders, may be apprehended *flagrante delicto*; (*d*) and even *persons of loose character*, and in a suspicious situation, termed *vagrants*, or rogues and vagabonds, or incorrigible rogues, may be apprehended and imprisoned, and *prevented* from committing offences by the interference of peace-officers and magis-

(*u*) 7 & 8 G. 4, c. 29, s. 66; c. 30, s. 32.

(*x*) 9 G. 4, c. 31, s. 27.

(*y*) See observations, *ante*, 23, note (*d*).

(*z*) 1 East, P. C. 271 to 273, 287; 9 G. 4, c. 31, s. 10.

(*a*) 7 & 8 G. 4, c. 29, s. 63.

(*b*) *Id.* c. 30, s. 28.

(*c*) 1 & 2 W. 4, c. 32, s. 31.

(*d*) Burn's J. Arrest, *supra*, n. (*q*), see reasons, 2 Mood. & Malk. C. N. P. 15

trates; (e) and dangerous lunatics may be imprisoned and taken care of, under the order of a justice. (f)

CHAP. I.
REMEDIES.

Public nuisances *may* be abated, and even with rather more force and to a greater extent than is permitted in case of a private nuisance. (g) So, a Court of Equity may, by injunction, prevent the erection or continuance of a public nuisance.

The *summary* proceedings for the *punishment* of small offences are very various, especially in modern times, when so much *summary* jurisdiction by information and conviction has been vested in magistrates, commissioners of customs and excise, and others.

The ancient and more constitutional proceedings tried by a *jury*, are presentments, inquests, indictments, and criminal informations, and to these recourse ought always to be had in cases of serious or important offences.

The *modes* of prosecuting offences have been much *simplified* by the recent modern acts for improving the administration of criminal justice in general, (h) and by the consolidation and amendment of the laws relating to offences against the person, (i) and to personal and real property, whether in the nature of larceny or robbery, or petty theft, (k) or wilful or malicious injuries to property; (l) and prosecutors and their witnesses are relieved from the expenses of conducting or giving evidence in support of any prosecution for *felony*, and for most prosecutions for *misdemeanors* of a *public* nature, and are even allowed compensation for trouble and loss of time. (m)

(e) See 5 G. 4, c. 83, s. 6; Burn's J. Vagrant. In these cases it will be observed, that in many instances imprisonment and punishment may be inflicted as it were for a mere *supposed disposition* to crime, so as to prevent the party from completing his *supposed* criminal intent. Looking at the provisions of that act, it should seem that in many cases the party ought to be discharged on finding sureties for his good behaviour, and that the long imprisonment for the *supposed* offence seems severe.

(f) 39 & 40 G. 3, c. 94, s. 3; 7 Bar. & C. 669. So before this act a private individual might imprison a lunatic to prevent mischief. See Bac. Ab. Trespass, D. 3.

(g) *Ante*, 10, *Lodie v. Arnold*, 2 Salk. 458.

(h) 7 G. 4, c. 64.

(i) 9 G. 4, c. 31.

(k) 7 & 8 G. 4, c. 29.

(l) *Id.* c. 30.

(m) 7 Geo. 4, c. 64, s. 22 to 24.

CHAPTER II.

RIGHTS OF PERSONS, THEIR INJURIES AND REMEDIES IN
PARTICULAR.

I. <i>Absolute</i> Rights, and their corresponding Injuries and Remedies are	II. <i>Relative</i> Rights, and their corresponding Injuries and Remedies are
1. Personal Security 32 to 47	1. Husband and Wife 53
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2 & 3. Limbs and Body 37	3. Guardian and Ward 69
4. Health 42	4. Master and Apprentice 70
5. Reputation 43	5. Master and Servants, Clerks, &c. 72
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3. Burial 50	

IN the preceding chapter we took a general view of rights, injuries and remedies. For *practical* utility, we will now proceed to consider *more particularly* each right and its injuries and remedies, occasionally introducing suggestions for rendering each right and remedy more certain and perfect. And first we will examine the absolute and relative rights of *persons*, and their respective injuries and remedies.

I. *Absolute*
Rights of persons,
Injuries,
and Remedies.

As relates to the *person*, rights are absolute or relative; *absolute* rights, such as every individual born or living in this country (and not an alien enemy) is constantly clothed with, and relate to his *own personal security* of life, limbs, body, health and reputation; or to his *personal liberty*; rights which attach upon every person immediately upon his birth in the king's dominions, and even upon a *slave* the instant he lands within the same. (a) And *relative* rights, such as between

(a) It is a maxim "*no slave can breathe in British air*," *Somersett's Case*, 11 State Trials, 340; 20 Howel's State Trials, 79; 1 Lord Raym, 147; 2 Bar. & Cres. 448. Hence after a slave has landed in England he is capable of receiving the benefit of a *donatio mortis causa*, *Stanley v. Harvey*, 2 Eden's Rep. 126; and this extends to all the British dominions, so that if a slave escape to any island belonging to England, or to an English ship not lying within those parts where slavery is allowed, as in our West India islands, East Florida, &c., he instantly becomes a freeman, and no action is sustainable by

the person to whom he belonged against a person who harbours him; 2 Bar. & Cres. 448; 3 Bar. & Ald. 353. But a contract by a slave with a person to serve him in consideration of his purchasing his freedom, is so far binding that an action may be supported to recover damages for nonobservance, though no specific performance could be enforced by *habeas corpus*, or in equity or otherwise; 2 Hen. Bla. 511. And if a slave, after arriving in England, continue in the service of his master without any express contract for wages there is no implied contract for any remuneration; 3 Esp. R. 3; 2 Car. & Pa. 231.

husband and wife, parent and child, guardian and ward, master and servant or clerk.

First. The *injuries* to LIFE are homicide, attempts to murder or maim, cruelty to infants, attempts to cause miscarriage, concealments of births, written and verbal threats to murder, challenges and fights. Relating to these, as well as almost all other injuries which are prejudicial to the individual as well as the public, there are three descriptions of remedies: 1st. The *preventive*; 2ndly. Those for *Compensation*; and 3rdly. *Punishments*.

CHAP. II.
I. ABSOLUTE
RIGHTS.

I. PERSONAL
SECURITY.
First. LIFE.
*Injuries, and
punishments.*

1st. The *preventive*, or protective remedies against injuries to life, allow the killing the aggressor, when *absolutely* necessary for self-defence, but *not otherwise*; for if two persons quarrel and fight and one runs away, and when the other overtakes him he pulls out a knife and stabs him, if death ensue, this is *manslaughter*, because his own life was not in danger, and the use of such a weapon of defence was illegal. (*b*) Though formerly otherwise, a proper self-defence, although it occasion death, is now *wholly* dispunishable; (*c*) and it is lawful even to break open an outer door upon a cry of murder, to prevent its completion; (*d*) and the imprisonment of a lunatic by a private individual, or by a justice, to prevent his committing homicide or mischief, is also expressly allowed. (*e*) So by application to a justice, in the case of threat of bodily harm, (*f*) or by exhibiting articles of the peace in the King's Bench, (*g*) security may be obtained to prevent the completion of the threatened or expected homicide, or other injury to the person.

1. Homicide.

Preventions
thereof.

As the writ of appeal of murder is now taken away, (*h*) there is no *compensation* directly recoverable from the party committing homicide. (*i*) But if an officer of justice, or other person, endeavouring to apprehend a criminal or certain persons, as offenders against the laws of customs or excise, be killed in the attempt, his widow or near relation, is entitled to an allowance to be paid out of the county rate. (*k*)

Compensation,
when.

Homicide, if unlawful and *malicious*, is punishable capitally with death as *murder*, (*l*) and if not malicious, but unlawful and blameable, as in case of want of due care, it is punishable as *manslaughter* with transportation for life, or for not less than

Punishments of
homicide.

(*b*) *R. v. Kessal*, 1 Car. & P. 437.

(*c*) 9 G. 4, c. 31, s. 10; formerly in such a case it was necessary to obtain a pardon and writ of restitution, though they issued of course on paying for the same, 4 Bla. C. 187, 188; 2 Curw. Hawk. 530.

(*d*) 2 Bos. & Pul. 260; 2 Rol. Ab. 546.

(*e*) 39 & 40 G. 3, c. 94, s. 3; 7 Bar. & Cres. 669. When not, see 4 Car. & P. 210.

(*f*) *Burn's J. Surety, Peace, and post.*

(*g*) *Id. ibid. and post.*

(*h*) 59 G. 3, c. 46.

(*i*) *Styles*, 347; 1 Lev. 247; *Yelv.* 89; 1 Lord Rayn. 339.

(*k*) 7 G. 4, c. 64, s. 30; 6 G. 4, c. 108, s. 61.

(*l*) 9 G. 4, c. 31, s. 3 to 8.

CHAP. II.
I. ABSOLUTE,
&c.
I. PERS. SEC.

2. Attempts to
murder, maim,
&c.

seven years, or with imprisonment for not exceeding four years, or a fine, according to the discretion of the judge. (m) But homicide, when justifiable or excusable, as in self-defence or even by misfortune, or under any circumstances which prevented the means of death from being felonious, is not punishable *at all*, not even nominally, though formerly it was otherwise. (n)

2. Certain *malicious attempts* TO MURDER, as maliciously administering or attempting(o) to administer to any person, or causing to be taken by such person, any poison or other destructive thing, (p) or shall maliciously attempt to drown, suffocate or strangle any person, or shall maliciously shoot at any person, or shall by drawing a trigger, or in any other manner attempt to discharge any kind of loaded arms at any person, or shall maliciously stab, cut, or wound any person with intent to murder him, he shall suffer death as a felon. So CERTAIN MALICIOUS ATTEMPTS TO MAIM, or *disfigure*, or *disable*, or do *grievous bodily harm*, are also punishable capitally; such as maliciously shooting at a person, or stabbing, cutting or wounding him with intent to maim, disfigure, or disable him, or to do him some other grievous bodily harm, or with intent to resist or prevent the lawful apprehension or detainer of the party so offending, or of any of his accomplices for any offence for which he may be liable by law to be apprehended or detained, is also punishable with death, unless in such cases where if death had actually ensued the homicide would not have constituted murder, and in that case the attempt would at most be a misdemeanor. (q)

3. Cruelty and
starving infants,
not capable to
support them-
selves.

3. So at common law, it is an indictable offence to expose a person of tender years, under the party's care, to the inclemency of the weather, (r) or to keep such a child, of inability to pro-

(m) 9 G. 4, c. 31, s. 9. In cases of homicide, amounting at most to manslaughter, the indictment should be framed accordingly and not for murder. In indictments, &c. for *manslaughter* much is for the decision of a jury. As in the instance of the recent prosecution of Heath in Sussex, for the manslaughter of Captain Burdett at Brighton by want of care in labelling medicine, which occasioned the death, where he was acquitted; so, much is vested in the discretion of a single judge as regards the *degree* of punishment. In a recent instance a party who, through the outer door of his house, shot a sheriff's officer whilst illegally forcibly attempting to break it open to effect an arrest, he was sentenced to transportation for life. Captain Nestor's case at Hertford Assizes.

(n) 9 G. 4, c. 31, s. 10, enacts, "that no punishment or forfeiture shall be incurred by any person who shall slay another by

misfortune, or in his own defence, or in any other manner without felony."

(o) 9 G. 4, c. 31, s. 11. It has been correctly observed, that the statutes are confined only to a few *particular* attempts, and that there is no legislative enactment which reaches *attempts* to murder by starvation, or by exposure to inclemency of the weather, or by blows, except so far as they may be considered as attempts to commit felony, and as such punishable with hard labour, under 3 Geo. 4, c. 114, and also at common law.

(p) It is not an *administering* of poison unless the poison or poisoned article be taken into the stomach. *R. v. Cadman*, cor. *twelve judges*, A.D. 1826; Carr. Crim. L. 237; S. C. 4 Carr. & P. 369, 371.

(q) 9 Geo. 4, c. 31, s. 12; what is, or is not a *wounding* under this clause, see 4 Car. & P. 381, 487, 558, 565.

(r) *R. v. Ridley*, 2 Campb. 650, 653.

vide for himself, without adequate food; (s) or for an overseer not immediately, and without waiting for a justice's order, providing food and medical care to a pauper, having urgent and immediate occasion for them. (t) But unless there be a legal obligation to afford relief it is otherwise; and, therefore, where a person had an idiot brother, who was bed-ridden in his house, and kept him in a dark room without sufficient warmth or covering, it was held that such misconduct did not sustain a charge of an assault or imprisonment, and that as he was under no legal obligation to clothe his brother he was not indictable for the omission. (u)

4. The unlawfully and maliciously administering to, or causing to be taken by a woman *quick* with child (usually between the sixteenth and twentieth week after conception) any poison or other noxious thing, or using any instrument or other means with intent to procure her miscarriage, is a capital felony, punishable with death; (x) and if the woman be *not quick* with child, or proved to be so, then the same act is punishable as a felony with transportation, for not more than fourteen years, nor less than seven, or in the discretion of the court, to imprisonment, with or without hard labour, for not exceeding three years, and whipping, if a male, and the court think fit. (x) To constitute an *administering* or causing to be taken, the woman must actually swallow the poisonous matter, and if she merely receive it into her mouth and then spit it out without swallowing it, the crime is not complete. (y)

5. And as the concealment of birth and death is generally suspicious, and therefore fit to be punished, it is provided that if any woman, having been delivered of a child, shall *by secret burying, or otherwise disposing of the dead body*, endeavour to conceal the birth, (z) she shall be guilty of a misdemeanor, and be liable to be imprisoned with or without hard labour for not exceeding two years. (a) So that if a child be born alive, and

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I. ABSOLUTE,
&c.
I. PERS. SEC.

4. Attempts to cause miscarriage.

5. Concealment of birth.

(s) *Rex v. Ridley*, 2 Campb. 650, 653; 1 Leach, 137; *Rex v. Friend & wife*, Russ. & Ry. C. C. 20.

(t) *Rex v. Meredith*, Russ. & Ry. C. C. 46; *Rex v. Booth*, Id. 47; *Rex v. Warren*, Id. 48; and *Hays v. Bryant*, 1 H. Bl. 253.

(u) *Rex v. Smith*, 2 Car. & P. 449.

(x) 9 Geo. 4, c. 31, s. 13. In other countries no such distinction is taken as to quickening, but the fœtus is equally protected between conception and birth, and see 1 Paris & Fonb. 239; 3 Id. 90; Beck's Med. J. as to the absurdity of the English law in this respect. If the woman be not with child at all, the administering is not an offence under this act, 3 Car. & P. 605.

(y) *Rex v. Cadman*, ante, 34, note (p).

(z) Conceal the birth. It should seem

that this term ought to be confined only to a child born alive, birth being the act of coming into life; for otherwise the act might apply to the concealment of a miscarriage even at an early period after conception. It has however been reported to have been decided under the previous act of Lord Ellenborough, 43 G. 3, c. 58, that a woman might have been found guilty under that act of concealing the birth of her bastard child, though from appearances it were probable that the child was still born. *Rex v. Cornwall*, Russ. & R. C. C. 336, and it has even been suggested that that decision appears to apply equally to the present provision; *sed quære*.

(a) 9 Geo. 4, c. 31, s. 14.

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afterwards die without any fault of the mother, yet if she attempt by the *above mentioned means* to conceal the birth, such *suspicious concealment* of itself constitutes a crime. (b) In a case of that nature, and where there is no ground for imputing the death of the child to the mother, the indictment should merely be for misdemeanor, and not, as too frequently the practice, with a view to the allowance of costs for murder, (c) and in another case it was laid down that on all inquests held on the bodies of dead children, it was the bounden duty of the coroner to tell the jury, in all cases where there was not the most *clear and decisive* proof that the child was *born alive*, that they ought never to think of returning a verdict of wilful murder against the mother. (d)

6. Threats to kill.

Challenges and fights.

6. *Threats against life*, without any actual attempt, and whether written or verbal, are also peculiarly punishable. (e) And *challenges* to fight duels, and provocations with intent to induce another party to send a challenge, may be prosecuted as misdemeanors by indictment, or by motion to the Court of King's Bench for a criminal information, where the case is fit for the interference of that higher tribunal. (f) And all parties concerned in or countenancing a *prize fight*, which may end in homicide, are liable to imprisonment and indictment, and it is the duty of magistrates and all others to prevent their taking place. (g)

(b) 9 Geo. 4, c. 31, s. 14. The mother's preparing clothes, &c. affords presumption against concealment, 4 Car. & P. 366.

(c) Per Holland, B. on Northern Circuit, A.D. 1832.

(d) Anne Bayley's case, at Stafford, 1828, before Vaughan, B., Carr. Crim. L. 243.

(e) 4 Geo. 4, c. 54, s. 3, enacts, that if any person shall knowingly and willingly send or deliver any *letter or writing* with or without any name or signature subscribed thereto, or with a fictitious name or signature, threatening to kill or murder any of his Majesty's subjects, or to burn or destroy his or their houses, outhouses, barns, stacks of corn, grain, hay, or straw, or shall procure, counsel, aid, or abet the commission of the said offences, or any of them, or shall forcibly rescue any person being *lawfully* in custody of any officer or other person for any of the said offences, every person so offending being thereof lawfully convicted, shall be adjudged guilty of felony, and shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for such term, not less than seven years, as the court shall adjudge, or to be imprisoned only, or to be imprisoned and kept to hard labour in the common gaol or house of

correction for any term not exceeding seven years. See 4 Car. & P. 562.

(f) 1 Burr. R. 316; 3 East, 581; 6 East, 464, 471; 2 Bar. & Ald. 462.

(g) *Rex v. Perkins and others*, 4 Car. & P. 537. It was there held that all persons who are present at a *prize fight*, and who have gone thither with the purpose of seeing the persons strike each other, are principals in the breach of the peace, and indictable for an assault as well as the actual combatants, and that it is not at all material which of the combatants struck the first blow: and see *Rex v. Bellingham*, 1 M. & R. M. C. 127, where Bayley, J. said, "My advice to magistrates and constables is, in cases where they have information of a fight, to secure the combatants before hand, and take them to a magistrate, who ought to compel them to enter into securities to keep the peace till the next assizes or sessions, and if they will not, to commit them to prison. In this way the mischief would be *prevented*, and the fights be put a stop to. The circumstance of an injury having been committed in an amicable or agreed fight may destroy any civil remedy, Com. Dig. Pleader, 3 M. 28; but would constitute no answer to a criminal proceeding for breach of the peace.

Secondly and thirdly. Injuries to the *limbs* or *body* are principally *assaults*, *batteries*, bruises and contusions, *wounding*, or *mayhems*. 1st. An *assault* is an attempt or offer, accompanied by a degree of violence, to commit some bodily harm, by any means, within a distance, and calculated to produce the end, if carried into execution, and to alarm the other party, and put him in well grounded apprehension of immediately ensuing actual injury. (*h*) Thus, levelling a gun at another within a distance from which, supposing it to have been loaded, the contents might wound, is an assault; (*i*) or riding, after a person and obliging him to run away into a garden to avoid being beaten, is an assault; (*k*) and if a master or medical attendant take indecent liberties with a scholar or patient, without her consent, or by misrepresentation, although she do not resist, he may be punished as for an assault; (*l*) and it is an assault in parish officers to cut off the hair of a pauper in the poor house against her will. (*m*) But abusive words alone however violent, cannot constitute an assault, and, indeed, they may sometimes so explain the aggressor's intent as to prevent an act *primâ facie* an assault from amounting to such an injury; as where a man, during assize time, in a threatening posture, half drew his sword from its scabbard, and said, "if it were not assize time I would run you through the body:" this was held to be no assault, the words explaining that the party did not intend to inflict any immediate injury. (*n*)

2. A *battery* is any unlawful touching the person of another by the aggressor himself, or by any other substance put or continued in motion by him, as by throwing about a squib in a public market-place, which put out the party's eye; (*o*) and the striking a horse upon which a person is riding, and by which he was in consequence thrown, is considered a battery upon him. (*p*) But it has been supposed that taking a hat off the head of another is not a battery; (*q*) and a battery must be either wilfully committed, or proceed from want of due care, for otherwise it is *damnum absque injuria*, and the party aggrieved is without remedy; as if a horse run away without any fault of the rider, and go over another person, no action lies, because the injury is considered as proceeding from the horse, and not from the rider. (*r*) But it would be other-

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I. ABSOLUTE,
&c.

I. PERS. SEC.
*Secondly and
thirdly. LIMBS
and BODY. In-
juries to, reme-
dies and punish-
ments.*

1. An assault,
what.

2. Batteries,
bruises, and
contusions,
what.

(*h*) 3 Bla. C. 120; Com. Dig. Battery, C.; Bac. Ab. Assault and Battery, A.; Burn's J. Assault; 3 Car. & P. 349.

(*i*) Id. ibid. Com. Dig. Battery, C.

(*k*) *Morton v. Shoppee*, 3 Car. & P. 373.

(*l*) *Rex v. Nichol*, R. & R. C. C. 130; *Rex v. Rosinski*, R. & M. C. C. 19; *Rex v. Dawson*, 3 Stark. R. 62; and *Rex v. Evans*, 1d. 35.

(*m*) *Forde v. Skinner*, 4 Car. & P. 238.

(*n*) 1 Mod. 3; Bul. N. P. 15; Vin. Ab. Trespass, A. 2; Hawk. c. 62, s. 1.

(*o*) 3 Bla. C. 120; 1 Saund. 29, b. n. 1, 13 & 14, note 3; 3 Wils. Rep. 403.

(*p*) 1 Mod. 24; Sir W. Jones, 444; 8 Moore, 63; 1 Bing. 213, S. C.

(*q*) 1 Saund. 14.

(*r*) Hob. 134; Plowd. 19; 1 Stra. 596; 3 Wils. 403; 4 Mod. 405; 2 Chit. R. 639.

CHAP. II.
I. ABSOLUTE,
&c.

I. PERS. SEC.
3. Wounding
and mayhem,
what.

4. Special as-
saults.

Prevention of
such injuries.

Compensations
and punish-
ments.

wise if he were riding furiously, or otherwise in fault. (s) Bruises and contusions are where the skin is not broken. (t)

3. A *wounding* consists in giving another a cut, or even a scratch, opening the flesh. (t) A *mayhem* is defined to be the deprivation of a member proper for defence in fight, and which are not only an arm, leg, finger, eye, and a foretooth, but also some others; but not, as it has been said, a jaw tooth, or the ear, or a nose, because they have been supposed to be of no use in fighting. (u) One remarkable circumstance peculiar to an action for a mayhem is, that the court may, on view of the wound, increase the damages awarded by the jury. (v)

4. Some assaults of a more *special* nature, as upon persons standing in particular situations, as clergymen, magistrates, officers, &c., are particularly provided against. (x)

All these may be *prevented* by the party attacked, or his servant or relation, even by forcible self-defence, but without using a *dangerous weapon*, unless life be in peril: (y) but a stranger or third person, not being a relative, must not proceed *ex parte*, but merely interfere, (*molliter manus*,) to preserve the peace, and *separate* the parties, and not defend the person about to be beat. (z) So, after threat of such an injury, sureties of the peace may be obtained by application to a justice of the peace. (a)

Compensation, strictly so termed, for batteries, wounds, and mayhems, can only be obtained by action in the superior courts, for the county court has no jurisdiction over trespasses *vi et armis*. (b) But conviction in a fine of 5*l.*, to be paid towards the county rate, may be obtained upon summary information before justices, (c) and in each case the wrong-doer may be indicted at common law for the breach of the peace. In the instance of the special assaults before alluded to, there are express punishments afforded by particular statutes. (d) Assaults, with intent to commit certain *felonies*, as murder, or to maim, or to commit an unnatural crime, or to rob, are specially punishable. (e) So, furious driving, (f) and the setting spring guns or other dangerous engines, excepting at night in a dwelling-house, are

(s) *Id.* *ibid.*; 8 Moore, 63; 1 Bing. 213, S. C.

(t) *Ante*, 34, note (q).

(u) 3 Bla. C. 121. But note, in examinations, in modern times, of a party, whether he be fit to serve in the army, the loss of any teeth which would be essential in biting off the end of a cartridge would be considered an objection, G. Smith's Med. Jurisp.

(v) 1 Wils. 5; 3 Salk. 115.

(x) 9 Geo. 4, c. 31.

(y) 2 Rol. Ab. 546.

(z) 2 Stra. 954.

(a) *Post*, c.viii.; Burn's J. Surety, Peace.

(b) Vin. Ab. County Court, 101.

(c) 9 Geo. 4, c. 31, s. 27, 28, 29, 33, 34, 35.

(d) 9 Geo. 4, c. 31, s. 23, 24, 25, 26, 29. Assaults on Park-keepers, 7 & 8 Geo. 4, c. 29, s. 29; on Custom House Officers, 6 Geo. 4, c. 108, s. 56, 57, 59.

(e) 9 Geo. 4, c. 31, s. 11, 12, 15, 18, 25. Attempt to rob, 7 & 8 Geo. 4, c. 29, s. 6.

(f) 1 Geo. 4, c. 4.

respectively indictable as a misdemeanor, on account of the danger, although no actual injury ensue; (*g*) and it is a general rule that whenever any act is declared to be a *misdemeanor* by the public criminal law, either by the common law or by statute, any particular individual having sustained special and particular damage may have his private remedy by action to recover compensation for the damage he has actually sustained; (*h*) although, in cases of felony, we have seen that the civil remedy is in general *suspended* until after the trial of the supposed offender. (*i*)

5. Mere *menaces* and *threats* of *bodily* harm, or to burn a house, which may occasion great personal injury, may also be *prevented* by the like means, as in the case of actual assault. (*k*) And *compensation* may be recovered by action, if the menace occasion any actual damage, as the deterring servants from performing their master's work; (*l*) and some menaces are indictable at common law. (*m*) A threat of murder or of burning a house, are highly penal by express enactments. (*n*)

6. A *rape* may be *prevented* even by killing the assailant. (*o*) It is an offence punishable with death, (*p*) and it is no longer essential to prove *all* the particulars formerly necessary to be established, it having been enacted that proof of penetration without more shall suffice; (*q*) and though it has been decided that if that be proved, yet actual proof of the negative of the other circumstance, which was formerly considered the more complete part of the offence, will entitle the offender to an acquittal; (*r*) it has been suggested that that doctrine is questionable. (*s*) At all events, however, if penetration cannot be proved, then the indictment should be for a misdemeanor, being the assault with intent to commit the capital offence. It has been held by the majority of the judges that the offence of rape is not committed if a party have carnal knowledge of a married woman without her consent, but under her supposition that the offender was her husband, because there was an absence of violence, terror, and alarm, which constitute part of the capital offence. (*t*)

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1. ABSOLUTE,
&c.

1. PERS. SEC.

5. Other menaces, and threats of bodily harm.

6. Rapes and attempts.

(*g*) 7 & 8 Geo. 4, c. 18, s. 1; 4 Bing. 643.

(*h*) 3 Bar. & Adol. 93, ante, 11.

(*i*) Ante, 10.

(*k*) Ante, 38.

(*l*) 2 Lutw. 1428; Co. Lit. 161.

(*m*) 6 East, 126; Burn's J. Threat.

(*n*) 4 Geo. 4, c. 54, s. 3.

(*o*) 1 Halc, 485; 2 Bos. & Pul. 260.

(*p*) "That every person convicted of the crime of rape shall suffer death as a felon," 9 Geo. 4, c. 31, s. 16.

(*q*) 9 Geo. 4, c. 31, s. 16, 18; 4 Car. & P. 249; Burn's J. Rape. What penetration sufficient, see Russen's case, 1 East, P. C. 438; 1 Russell, 803. In that case it was held that the *least degree* of penetration is

sufficient, though not attended with the deprivation of the marks of virginity. In that case it was proved, that the parts of the injured party were so narrow that a finger could not be introduced, and that the hymen was whole and unbroken, and yet this was held a sufficient penetration to complete the offence, emission having also been proved, which was necessary, as the law stood at that time; mere proof of penetration now suffices, 4 Car. & P. 249.

(*r*) *Rex v. Russell*, 2 Mood. & M. C. N. P. 112, cor. Taunton, J.

(*s*) Id. 123, in notes, *sed quare*.

(*t*) *Rex v. Jackson*, R. & R. C. C. 487.

CHAP. II.
1. ABSOLUTE,
&c.

I. PERS. SEC.
7. Carnal know-
ledge of female
children.

7. If any person shall unlawfully and carnally know and abuse a *girl under the age of ten years*, he is punishable capitally as a felon; but if the girl be above the age of ten and under twelve years, the offence is only a misdemeanor, subjecting the offender to imprisonment, with or without hard labour, for such term as the court shall award; and in both these cases proof of penetration, however small, is sufficient to establish the offence. (s) If there be no evidence of the latter, then the offender may be indicted for the assault with intent to abuse and carnally know, and should the jury find that the prisoner only assaulted the child with intent to abuse her, and negative the intention charged carnally to know her, prisoner may be convicted and sentenced to twelve months imprisonment, the averment of intention being divisible. (t) If a master or medical attendant take indecent liberties with his scholar or patient, he may be convicted as for an assault, though not with intent to commit a rape or carnally know. (u)

We may here observe that the *specified* ages in these cases are completed at the first instant of the day *before*, and not upon, the anniversary of the day of the birth. (r)

8. Indecent ex-
posures of per-
son.

8. The wilful exposure of the naked person in a public situation, even for bathing, and with or without any criminal intent towards females, is punishable as a misdemeanor; (w) and where a medical man with a similar intent persuaded a female patient to strip, under pretence that the examination was essential to enable him to prescribe, he was convicted upon an indictment charging the special assault. (z)

9. Abduction of
females and in-
fant children.

9. Other punishable injuries to the person, are the *forcible abduction of any female* possessed of certain property, for the sake of her fortune, with intent to marry or defile her, and which is felony, punishable with transportation or imprisonment not exceeding four years. (y) So the unlawful taking away any unmarried girl under the age of *sixteen* out of the possession of her father or mother, or other person having the lawful care of her, is a misdemeanor, punishable with fine or imprisonment, or both, as the court shall award; (z) and the maliciously by force or fraud leading or taking away, or decoying or enticing away, or detaining *any child*, male or female,

(s) 9 Geo. 4, c. 31, s. 17, 18; *Rex v. Russen*, 1 East, P. C. 438; 1 Russ. 803; ante, 39, tit. Rape.

(t) *Rex v. Dawson*, 3 Rush. R. 62; and *Rex v. Evans*, id. 33.

(u) *Rex v. Nicholl*, R. & R. C. C. 130; *Rex v. Rosinski*, R. & M. C. C. 19.

(r) *Post*, c. ix.

(w) 2 Campb. 89; and see Vagrant Act, 5 Geo. 4, c. 83, s. 4.

(x) *Rea v. Rosinski*, R. & M. C. C. 19.

(y) 9 Geo. 4, c. 31, s. 19.

(z) *Id.* s. 20.

under the age of *ten years*, with intent to deprive the parent or parents, or other person, of the lawful possession of such child, or with intent to steal any article, or receiving or harbouring any such child, knowing the same to have been so taken away, is felony, and punishable with transportation for seven years or imprisonment; but there is an exception in favour of fathers taking their illegitimate children from the mother. (*a*).

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I. ABSOLUTE,
&c.

I. PERS. SEC.

10. The offence of *bigamy* is punishable with transportation for seven years, or imprisonment, with or without hard labour, for not exceeding two years. (*b*) An illegal deceptive marriage, when effected by conspiracy, is a misdemeanor at common law, punishable by indictment or information; (*c*) and, under the marriage act, the husband forfeits his interest in the property he would otherwise acquire by the marriage. (*d*)

10. Bigamy.

11. *Unnatural offences* are punishable capitally upon proof only of penetration; (*e*) but if the latter cannot be proved, then the prosecution should be for the misdemeanor, the attempt to commit the offence: the conviction even of the latter offence would enable the offender's wife to proceed in the Ecclesiastical Court for a divorce. (*f*)

11. Unnatural
offences.

12. Injuries to the person, limbs, or body, occasioned by *negligence* or *misfeasance*, subject the wrong-doer to an action for the recovery of damages; as injuries arising from leaving open trap doors or areas in public streets, (*g*) or suffering a dangerous dog to go at large or to be placed in an open yard, (*h*) or any injuries from similar causes; (*i*) and where the injury is of a public nature, the party may also be indicted for the nuisance. (*k*)

12. Injuries to
body or limbs
by want of due
care, as from
nuisances, &c.

When the injury to the person has occasioned considerable damage, and can be readily proved by third persons, an action for compensation may be the preferable remedy; but in case of secret injuries, which require the evidence of the party himself clearly to establish the facts, a summary proceeding before justices or an indictment may be preferable. And when the

When it is ad-
visable to indict
or to sue.

(*a*) 9 Geo. 4, c. 31, s. 21.

(*b*) Id. s. 22.

(*c*) 3 Ves. & Beames, 175.

(*d*) 4 Geo. 4, c. 76, s. 23; Russ. & Ry. C.C. 459, *post*.

(*e*) 9 Geo. 4, c. 31, s. 15, 18.

(*f*) It was determined by the Court of Delegates, that the public infamy of the husband, arising from a judicial conviction of an attempt to commit an unnatural crime, is a sufficient cause for the Ecclesiastical Court to decree a separation *a mensa et thoro*. Feb. 1794, 3 Bla. Com. 94,

note (15), Chitty's ed.; and see Mr. Christian's note in his edition.

(*g*) 5 Bar. & C. 519; 3 Campb. 398; 4 Campb. 262.

(*h*) 4 Car. & P. 297; 3 Car. & P. 138, *post*, c. vii.; Com. Dig. Action, Negligence, A. 5.

(*i*) 4 B. & C. 223; 1 Car. & P. 636; 5 M. & S. 198; who not, 4 M. & S. 27.

(*k*) Burn's J. Nuisance, II.; with respect to unsound steam engines, 1 & 2 G. 4, c. 41, s. 1.

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I. ABSOLUTE,
&c.

I. PERS. SEC.

injury is of a trifling nature, it should be remembered, before the commencement of an action, that costs are not recoverable unless the plaintiff obtain a verdict for forty shillings; (l) and that courts and juries seldom participate in the feelings of resentment occasioned by a mere trifling assault; and, consequently, plaintiffs proceeding for them would probably only expose themselves to ridicule and contempt. (l)

Fourthly.
HEALTH, inju-
ries, and reme-
dies.

Fourthly. The *health* of an individual may be *injured* by a public or private nuisance, as by breaking quarantine, by sale of unwholesome food, by want of due care in medical practitioners, or by sudden alarms affecting the nervous system. The *remedies* are threefold, preventive, compensatory, or punishment. Private and public nuisances to health already existing, and not merely prospective or apprehended, may, in some cases, be *prevented* by *abating* or removing by act of the individual sustaining a resulting injury, (m) or they may, whilst in progress, be prohibited and restrained by *injunction* obtained summarily upon bill filed and motion to a Court of Equity. (n) *Compensation* may be obtained for the private and particular injury by action on the case, (o) and the public nuisance may be *punished* and abated upon judgment, and by writ upon an indictment; (p) and breaking quarantine is particularly punishable. (q) The sale of *unwholesome food* is prohibited, and punishable at common law and by statutes, and sometimes prevented by local customs. (r) Thus, there are particular enactments against millers and bakers, to prevent the adulteration of flour and bread, and an indictment at common law is sustainable against a baker for selling bread improperly mixed with alum, though only by his servants. (s) So, the sale of bad meat, (t) and bad butter, (u) and of bad food in general, (x) are prohibited and punishable; and if there be a conspiracy to sell bad food it is punishable at common law. (y) So it is illegal to sell or mix drugs with beer; (z) and in some of these cases, if adulterated, or bad articles be found, they may be seized, (a) and the wrongdoer is subjected to penalties. Innkeepers selling unwholesome

(l) *Ante*, 23, 26, 27.

(m) 12 Mod. 510, *post*, c. vii.

(n) *Post*, ch. viii.

(o) 9 Coke, 55, 58, b.; 16 East, 196.

(p) 8 T. R. 142.

(q) 6 Geo. 4, c. 78 & 105; 4 Term R. 202.

(r) 3 B. & Adolp. 43, and case there cited.

(s) 31 Geo. 2, c. 29, s. 29, 30; Burn's J. Bread, and tit. Mill; 3 M. & S. 11.

(t) Burn's J. Butcher; 1 Stark. Slander, 143.

(u) 36 Geo. 3, c. 86, s. 4.

(x) 2 East, P. C. 822; 6 East, 133.

(y) 2 Ld. Raym. 1179.

(z) 56 Geo. 3, c. 58, s. 2, 3; Burn's J. Excise, vol. II. 324, 325; and Burn's J. Alehouse, IV. & V.; *Langton v. Hughes*, 1 M. & S. 593; *Attorney-General v. King*, 5 Price, 195.

(a) 31 Geo. 2, c. 29, s. 29, 30.

wine (*b*) or victuals may, it is said, be indicted for a misdemeanor at common law, and any person to whom the same has been sold may maintain an action against him for the injury done; (*c*) and it has been holden a good custom in a manor for the homage to search and seize all unwholesome food offered for sale. (*d*)

So if the health of an individual be injured by the unskilful or negligent conduct of a surgeon or apothecary, or general practitioner, in assuming to heal a dislocated or fractured limb or internal disorder, an action for compensation may be sustained, (*e*) or the wrong-doer might be proceeded against by censure in the college, (*f*) or for gross negligence or misconduct he might be indicted. (*g*)

It should seem, on principle, that if the health of an individual be injured by a person wilfully assuming the appearance of a ghost, or doing any other act on purpose to terrify persons, and whose nerves are thereby injured, an action would lie for the consequence; and that the wrong-doer might be indicted for the *misdemeanor*, although Lord Hale has stated that if death should ensue the offender could not be indicted for murder. (*h*) And we have seen that if a parent or master, or other person having the custody of an infant unable to support himself, and whose legal *duty* it was to feed and take adequate care of the same, and thereby injure the child's health, he would be indictable for the misdemeanor. (*i*)

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Mala praxis.

Fifthly. Injuries to *reputation* are *written* or *verbal* slander, and *malicious prosecutions* imputing the guilt of some disreputable crime.

Fifthly. REPUTATION, injuries, remedies, and punishment.

1. A *libel* signifies any malicious defamation expressed either in printing, writing, pictures, or effigies. (*k*) Every *written* calumny is actionable and punishable, although it do not impute any indictable offence, but merely tend to disgrace or ridicule, or bring into contempt the party calumniated, even by imputing hypocrisy or want of proper feeling, and still more if it impute fornication, swindling, or any other deviation from moral recti-

1. Libels, what.

(*b*) As to mixing wine with other wine, or with any other thing, 100*l.* penalty, and 40*l.* penalty on the retailer, 12 Car. 2, c. 25, s. 11; 26 Geo. 3, c. 59, s. 23; 54 Geo. 3, c. 77, s. 4, 8; Burn's J. Excise, Wine.

(*c*) Rol. Ab. 95; 2 East, P. C. 822; 6 East, 133; 2 Bla. C. 162; Burn's J. Alehouses, IV. & V.; 7 & 8 W. 3, c. 30, s. 23; 22 & 23 Car. 2, c. 5, s. 11.

(*d*) *Vaughan v. Atwood*, 1 Mod. 202; *Willcock v. Windsor*, 3 Bar. & Adolp. 47.

(*e*) 2 Wils. 359; 8 East, 348.

(*f*) Com. Dig. Physician; Vin. Ab. Physician.

(*g*) *The King v. Long*, 4 Car. & P. 398; Id. 407, n. (*u*); Id. 423; 3 Car. & P. 629, 635.

(*h*) 4 Bla. C. 197, 201, note 25; G. Smith's Forensic Med. 34, 37, 38; 1 Paris & Fonbl. 351, 352; 1 Hale's P. C. 429.

(*i*) *Ante*, 34, 35, and *post*.

(*k*) 5 Coke, 125.

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tude or principle, (*l*) unless it were written and published on a *lawful occasion*, as in bonâ fide giving a fair character of a servant or a confidential communication, or to a certain extent a correct report of a trial or proceeding in court, where both plaintiff and defendant may be supposed to have been present before the court. But not a report of an *ex-parte* proceeding, (*m*) or matter relating to a third person not before the court. (*n*)

The continued publication of a libel may be *prevented* by destroying it, (*o*) but not by a cross libel on the wrong-doer. (*p*) It may be *compensated* by action, in which full costs may be recovered although the damages be under forty shillings, (*q*) and it may be *punished* by indictment. (*r*) If the libellous matter were in an affidavit or articles of the peace, or in the course of *other legal proceedings*, then the party scandalized can merely apply to the court to have the matter struck out, and cannot sustain any action. (*s*)

2. Slanderous
words.

2. But *slanderous words* cannot legally be *prevented* by battery of the slanderer, (*t*) nor can any action be supported unless the words either *first* impute the guilt of some *temporal* offence for which the party slandered, if guilty, might be indicted and punished in the temporal courts, and which words are technically said to endanger a man in law; or, *secondly*, impute the having an existing contagious disorder tending to exclude from society; (*u*) or, *thirdly*, an unfitness or inability to perform an office or employment of profit, or want of integrity in an office of honour; (*v*) or, *fourthly*, words prejudicing a person in his lucrative profession or trade; (*x*) or, *fifthly*, any *untrue words* occasioning *actual damage*. (*y*)

If the words, however insulting, do not in themselves or by circumstances import any certain charge under one of the first four of these heads, and be not followed by actual damage, then there is no remedy in courts of *common law*; thus to call a man "forsworn," or a "scoundrel," or a "cheat," or a "rogue," or a "rascal," and perhaps a "swindler," is not actionable, because the words do not *necessarily* import that the party has committed any

(*l*) 4 Taunt. 355; 2 Bar. & C. 678; 1 Bos. & P. 331; 2 Bos. & P. 748; 2 H. Bla. 532; 2 Wils. 404.

(*m*) *Deacon v. Devereux*, 2 Russ. Chan. Rep. 607.

(*n*) *Lewis v. Clement*, 3 Bar. & Ald. 702.

(*o*) *Semble*, 2 Camp. 511; 5 Coke's R. 125, b. post.

(*p*) 2 Stark. R. 93.

(*q*) 1 Saund R. 228; 1 Stra. 193.

(*r*) Andr. 384; 1 Stra. 420; 2 Stra. 1157.

(*s*) 1 Saund. 132, note (1); 2 Shaw, 245; 3 Dow. R. 377; *Hodson v. Scarlett*, 1 Bar. & Ald. 232.

(*t*) 3 Wils. 186; 6 T. R. 694.

(*u*) 2 T. R. 473.

(*v*) 2 Salk. 695.

(*x*) 3 Wils. 186; 1 Lev. 115.

(*y*) 1 Lev. 53; 2 Leon. 111; 6 T. R. 130; 1 Taunt. 39.

punishable crime. (z) But if either of those, or any other expression, should be accompanied by any other circumstance tending to fix a direct imputation of some punishable crime upon the party calumniated, and be so understood by any other third party, then the otherwise uncertain imputation may become actionable; (a) and a general charge of criminality, by a term known in law to impute a punishable crime, is actionable, as to call a person a "traitor," "highwayman," "thief," or to say he is guilty of "perjury" or "murder," though the particulars of any pretended crime be not stated. (b) A mere *verbal* imputation of the breach of any *mere moral* virtue, duty, or obligation, such as chastity, sobriety, &c. (though it may depreciate a person in the opinion of society, and subject him to censure and punishment in the Ecclesiastical Courts, yet does not expose him to punishment in the Temporal Courts) is not actionable, unless followed by actual damage. (c) And the party aggrieved must, to punish the slanderer, prosecute him in an Ecclesiastical Court; though, when the accusation is partly of an offence punishable in the Ecclesiastical Courts and partly in the Temporal Courts, or where special damage has been sustained, the latter courts have the exclusive jurisdiction, and will then afford redress for the entire slander. (d)

Actions for words are restrained by the enactment, that the plaintiff shall recover no more *costs* than damages, unless he obtain a verdict for forty shillings; (e) and there is in general no *punishment* by indictment or otherwise for *verbal* slander, unless in the case of insulting words spoken to a magistrate whilst in the exercise of his office. These, and other distinctions between verbal and written slander, proceed upon the principle that the former are often spoken in heat upon sudden provocations, and are fleeting and soon forgotten, and, therefore, less likely to be permanently injurious; but that written slander is more deliberate and more malicious, more capable of circulation in distant places, and, consequently, more likely to be permanently injurious.

Malice is in general to be *inferred*, as well in the publication of written as of verbal slander, (f) unless the occasion of uttering the slander afford a contrary presumption; as where the

Express malice,
when or not
essential.

(z) 3 Wils. 177; 6 T. R. 691; 2 H. Bla. 531; 4 Co. 16, b.; 2 Chitty's R. 657.

(a) Id. ibid, 6 T. R. 694.

(b) Cro. Jac. 114; 1 Stra. 142; 2 New R. 335.

(c) 4 Taunt. 355.

(d) 2 T. R. 473; 1 Lev. 134; 3 Lev. 193.

(e) 4 East's Rep. 567; 2 Wils. 258.

(f) 4 Bar. & Cres. 247, 585; 9 Bar. & Cres. 643; 4 Bing. 195; 12 Moore, 418, S. C.

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calumny was in giving the character of a servant, (g) or by a counsel or justice of the peace in the course of a cause or proceeding; (h) and in a case of this nature, the party suing must prove express malice; (i) and where the language is ambiguous, and it is doubtful whether it implies any injurious matter to the plaintiff, the proper question for the jury is, not whether the *intention* of the publication was to injure the plaintiff, but whether the tendency of the matter published was so injurious. (k) The term *malice* is well defined in an old case, and its derivative *malò animo*, in its more extensive signification, well explained and applied; the term does not necessarily mean what must proceed from a spiteful, malignant, or revengeful disposition, but a conduct injurious to another, though proceeding from an ill-regulated mind not sufficiently cautious before it occasions an injury to another; malice, in *vulgar* acceptation, is a desire of revenge, or a settled anger against a person, but in its *legal* sense it means the *doing any act without just cause*. (l)

Restraint upon
communication
of slanderous
reports.

Though much allowance has been made for the weakness of mankind in indulging in conversation scandalizing individuals, instead of accumulating better materials for mental improvement, yet that weak and mean propensity has of late been properly checked by the decisions of the courts, that in reporting calumnious statements of others not only must the name of the original author be given as the source of the information, but the *precise* words must be repeated, or their substance, without any additional assertion of the repeater, so as not only to give a perfect action against the original author, whose assertion, if

(g) 3 Bos. & P. 587; 3 B. & Cres. 578.

(h) 1 Dow. R. New S. 495; 4 Wilson and Shaw, 102.

(i) 9 Bar. & Cres. 403; 4 Bar. & Cres. 247, 584; *Allardice v. Robertson*, 4 Wils. & Shaw, R. 102; 1 Dow. R. New S. 495; 8 Bar. & Cres. 578.

(k) *Fisher v. Clement*, 10 Bar. & Cres. 472.

(l) Gilb. Cases, L. & E. 190; 2 Bar. & Cres. 257. In 3 Bar. & Cres. 584, Abbott, C. J. said, "I take it to be also a general rule that an act unlawful in itself, and injurious to another, is considered both in law and reason to be done *malò animo* towards the person injured, and this is all that is meant by a charge of *malice* in a declaration of this sort, which is introduced rather to exclude the supposition that the publication may have been made on some *innocent* occasion, than for any other purpose. There are even some acts not in themselves unlawful, but which become so only by reason of their

injury to others, which in all civil actions are charged to be *maliciously done*. Take the common case of an offensive trade, the melting of tallow for instance, such a trade is not in itself unlawful, but if carried on to the annoyance of the neighbouring dwellings, it becomes unlawful with respect to them, and their inhabitants may maintain an action, and may charge the act of the defendant to be *malicious*; and no one ever objected to such a charge, though probably in most cases the defendant has no personal malice towards his neighbours, but acts only with a view to his own profit and gain. The publication in question impeaches the plaintiff's character; a publication impeaching private character is actionable, unless the occasion of publishing makes the publication excusable; as where the publication is a violation of the criminal jurisprudence of the country, and there is nothing to call for it, the publication is not excusable."

it stood alone, might not be credited, but also without adding weight or effect to the prior slander; (*m*) and it is not even an excuse to repeat in *writing* what has been previously spoken or written by others. (*n*)

In case of written slander, imputing any immorality that cannot be so well negated by the testimony of others, it may be advisable for the party calumniated, to *indict* the slanderer, because in support of the prosecution he would himself be a witness, and by his positive evidence negative all imputation on his character.

3. *Malicious* prosecutions are another mode of affecting the *character*, but these will be more properly considered under the next head of injuries to *liberty*, which they also in general affect.

There are also some descriptions of *threats*, which at the same time that they create alarm also injure the character, and are highly punishable, such as written menaces to impute any infamous crime, with intent to extort money, which are punishable capitally by indictment as robbery. (*o*) Menaces, or forcible demands of chattels with intent to steal, are punishable with transportation for life, or not less than seven years, or imprisonment for not more than four years, and with whipping if a male offender; (*p*) and any accusation or threat to accuse any person of any offence punishable with death, or transportation, or pillory, or of an assault with intent to commit a rape, or of any infamous crime, with intent to extort any chattel or money, is punishable in like manner; (*q*) and at common law extorting by duress or threat of accusation of an unnatural offence was indictable. (*r*)

The infraction of *personal liberty* has ever been regarded as one of the greatest injuries. It will be observed; that in the scale of punishments the legislature, in most of the statutes we have noticed, have considered four years' imprisonment as nearly equivalent to transportation for life, or for seven years. The injuries to liberty are principally termed "*false imprisonments or malicious prosecutions.*"

Imprisonment consists of any restraint of a person contrary to his will; the most obvious are the confinement in a prison, or private house, or in the stocks, or by forcible detention in the street, or by a peace officer touching another by way of

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When preferable to indict for a libel.

3. Malicious prosecutions.

Threats of criminal charges, injurious to reputation and punishable.

H. PERSONAL LIBERTY.

Injury by imprisonment defined, and what not.

(*m*) *McPherson v. Daniels*, 10 B. & C. 263.

(*n*) *De Crespigny v. Wellesley*, 5 Bing. 392.

(*o*) 7 & 8 Geo. 4, c. 29, s. 7.

(*p*) *Id.* sect. 6.

(*q*) *Id.* sect. 8.

(*r*) 6 East, 126; Burn's J. Threat.

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arrest. (s) But it has been decided that the lifting up a person in his chair, and carrying him out of the room in which he was sitting with others, and excluding him from the room was not a false imprisonment, so as to entitle him to a verdict and full costs on a count for false imprisonment; (t) and the merely giving charge of a person to a peace officer, not followed by any actual apprehension of the person, does not amount to an imprisonment, though the party to avoid it on the next day attend at a police office; (u) and if in consequence of a message from a sheriff's officer holding a writ, the defendant execute and send him a ~~bañ~~ bond, such submission to the process will not constitute an arrest, in proof of an allegation of arrest, in an action for maliciously holding to bail. (x)

1st. False imprisonment defined.

1st. The term *false imprisonment*, though technical, does not appear to convey any sufficiently definite meaning. It means in law any *illegal imprisonment*, either without any process *whatever*, or under colour of process *wholly illegal*, without regard to any question whether any crime has been committed or a debt due, so that the proper civil remedy is *trespass vi et armis* as for a direct injury wholly unwarranted even in its inception. Whereas the terms "*malicious prosecution*," or "*malicious arrest*," always in law suppose *regular* process and proceedings, but that the *facts* did not warrant their issuing, and which is to be decided by the *result*; as where the warrant to imprison a party was *perfectly regular* and proper, but he was *innocent* of the supposed crime and ultimately acquitted; or where there has been a *sufficient affidavit* to hold to bail and a *valid writ*, but when, *in fact*, no debt was due, and so established on the trial or other termination of the suit. In the latter cases the remedies are *not* by *trespass vi et armis* as for a direct injury, but by action on the *case* for the *malicious* adoption of the *regular* proceeding when there was no probable cause or ground for issuing it.

2dly. Malicious prosecution, or arrest, defined.

These distinctions are also *substantially* important, for if the process or the imprisonment were *wholly illegal* or *misapplied* as to the *person* intended to be imprisoned, without regard to any question of fact, or whether guilty or innocent, or the existence of any debt, then the party imprisoned may legally *resist* the imprisonment and may escape or be rescued, or even break prison; whereas however innocent he might be, yet if

(s) Bac. Ab. Trespass, D. 3; 1 Esp. R. 431, 526.

(t) *Gardner v. Wedd*, Easter T. 1825, C. P. on a motion for a new trial from Essex; *sed quære*.

(u) 1 Esp. R. 431; 2 New R. 211; 1 Car. & P. 153; 1 R. & M. 26.

(x) 6 Bar. & Cres. 528; 7 Dowl. & R. 233; 9 Bing. 91, S. P.

the process and imprisonment were in form legal, each of those acts would be highly punishable, (y) for he ought to submit to the legal process and obtain his release by due course of law. Even in cases where the imprisonment is *manifestly informal and illegal* the party must not, to obtain his release, use any dangerous weapon, and the safest course in all cases is to obtain liberty by *habeas corpus*, or by procuring bail as hereafter fully explained, (z) by which means relief from continued imprisonment may be speedily obtained, and without prejudicing the remedy by action for the intervening illegal imprisonment.

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Compensation for every illegal imprisonment without process, or under void or misapplied process, may be obtained by action of *trespass*, in which damages under forty shilling in general entitles the plaintiff to full costs, (a) and the wrong-doer may also be indicted. (b) The cruel act of forcing or leaving a seaman abroad is punishable by particular enactment. (c)

Compensation
for illegal im-
prisonments.

The compensation for imprisonment, under colour of *regular criminal or civil process*, is by action *on the case*, (not *trespass*), and is subjected to certain qualifications, even if it turn out in the result of a prosecution that the party imprisoned be acquitted, or that in an action he obtain a verdict or nonsuit, it does not necessarily follow that he can recover any compensation for the intervening imprisonment; for there may have been adequate *reasonable ground* for setting on foot the inquiry, though it may ultimately be established that there was no crime or no debt. It has been considered that if in the event of every acquittal the prosecutor were liable to an action, the apprehension of that consequence would deter persons from becoming prosecutors, and crimes would go unpunished; and with regard to actions, it has also been considered that the trial of a private claim in a public court of justice is matter of right, and if the party do not succeed, his payment of the defendant's costs is a sufficient compensation. The presumption, therefore, is in general in favour of the prosecutor and of the plaintiff that they properly instituted the proceeding; and with respect to prosecutions for felony, the judges at the Old Bailey, 6 Car. 2, resolved, "that no copy of any indictment for felony be given without special order upon motions made in open Court, at the general gaol delivery; for that the late frequency of actions against prosecutors, which cannot be without copies of the indictment, deterreth people

(y) *Post*, c. vii.

(z) *Post*, c. viii.

(a) 3 Bla. C. 318; 6 T. R. 11.

(b) 4 Bla. C. 218, 219; 2 Burr. 993.

(c) 9 Geo. 4, c. 31, s. 30.

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from prosecuting for the king upon just occasions."(*d*) But it has been well observed that the power of the judges to make such resolution and order, was, to say the least, questionable; and the better opinion is, that an acquitted defendant is entitled, as a matter of right, to a copy of the record of his acquittal, as well in felonies as misdemeanors.(*e*) In both the cases of an acquittal upon a *criminal* charge, or in an *action* where the proceeding has been unnecessarily and vexatiously by *arrest*, if the acquitted defendant can prove that there was *no probable cause* for instituting the indictment, or proceeding by arrest, (i. e. no adequate ground at the time to induce a prudent and cautious man, uninfluenced by revenge, to suspect the guilt of crime, or the existence of so large a debt,) and still more, if he can show *express malice*, (which however is in general to be inferred from the want of probable cause,) then he may in a *special action on the case* obtain compensation for the vexatious proceeding. But in general the *onus probandi*, at least, of the want of probable cause, lies upon the acquitted defendant.(*f*) In cases of arrests, either malicious or without adequate cause, the superior courts have summary jurisdiction on motion to compel the plaintiff to pay the defendant's costs,(*g*) but not to make compensation, which can only be enforced by action. However, if a party has maliciously and falsely sworn to a debt, he may be punished by indictment for perjury,(*h*) and when several *combine* they may be indicted for the conspiracy.(*i*)

3. Rights of
Burial. (*k*)

Burial, in *some part* of the parish church-yard, is a common law right, without even paying for breaking the soil, and that right will be enforced by *mandamus* to the incumbent,(*l*) but

(*d*) Kelyng's Rep. 3; *Brown v. Cumming*, 10 Bar. & C. 41.

(*e*) *Brown v. Cumming*, 10 Bar. & C. 70. It would be a monstrous power to vest in a judge to prevent an acquitted defendant from trying his civil remedy for the injury to his character and person by an unfounded prosecution. A jury is the only proper jurisdiction to decide upon the propriety of the prosecution.

(*f*) 2 Bar. & Adolp. 179; 1b. 695; 1 Bar. & Adol. 128; 3 Bar. & Cres. 139; 2 Wils. 307; 3 Bla. C. 126, note 20; 4 B. & C. 26.

(*g*) 43 Geo. 3, c. 46, s. 3.

(*h*) Peake's Rt. 112.

(*i*) 2 Burr. 993.

(*k*) Although as *burial* is subsequent to death it can scarcely be regarded as strictly an absolute right of the deceased, but is rather a part of the public law enforcing decency, yet as it is usually contemplated, and frequently regulated by will and by the wish of the deceased party, and

is usually complied with, it is submitted that the right may properly be here considered. See in general Burn's Eccl. L. tit. Burial, 1 vol. 258. Funeral expenses to the extent of 20*l.* have recently been allowed even against a creditor, 1 Bar. & Adol. 260, and see 2 Bla. Com. by Chitty, 508, n. 31. The burial of dead bodies, cast on shore, is enforced by 48 Geo. 3, c. 75; Burn's J. tit. Burial; and of persons found *felo de se*, by 4 Geo. 4, c. 52. Funerals are exempt from tolls by 3 Geo. 4, c. 126, s. 32. A conspiracy to prevent a burial is indictable at common law, 2 T. R. 734; and so is the wilfully obstructing a clergyman in reading the burial service over the dead in the parish church, and by threats and menaces hindering the burial, 7 Dowl. & Ry. 461. The recent Anatomy Bill, 2 & 3 W. 4, c. 75, regulates schools of anatomy, and is calculated to prevent the stealing of dead bodies.

(*l*) Willes, 258; 2 Bar. & Ald. 806; 1 Chit. R. 588, S. C.; 1 Bar. & Ald. 142.

the particular mode and precise place of burial are entirely of ecclesiastical cognizance, and the incumbent is the proper judge of the fitness or unfitness, whether any particular person ought to have privilege of being buried in the body of the church, or in any particular part of a church-yard, or in any particular manner, as whether in a stone or iron coffin; (*m*) and therefore the Court of King's Bench refused a mandamus to enter the body of a parishioner in an iron coffin. (*n*) Nor will the Ecclesiastical Court enforce such a burial, though they will regulate the fees in case the incumbent agrees to bury the body in a coffin constructed of such durable materials. (*o*) Nor will the Court of King's Bench even grant a mandamus to compel the rector to bury the corpse of a parishioner in his family vault, or in any particular part of a church-yard, that being entirely in the discretion of the parson. (*p*) And where a rector, in consideration of 20*l.*, by parol, gave leave to a person to make a vault in the parish church and to bury a corpse there, and promised that he should have the exclusive use of such vault, but afterwards, without leave of that person, opened the vault and buried another person there, it was held that no action on the case or otherwise could be sustained against him for so doing; for that even supposing that the rector had power to grant the exclusive use of a vault during his own life, yet he could not do it by parol, as a grant under seal is always essential to the creation of a freehold easement; (*q*) and it was also considered that a rector cannot grant a family vault in the church, but only leave to bury there in each particular instance. (*r*) It should seem, therefore, that, in order to acquire *de novo* a perfect right to be buried in a particular vault or place, a *faculty* must be obtained from the ordinary, as in the case of a pew; or a man may prescribe that he is occupier of an ancient messuage in a parish, and ought to have separate burial in such a vault within the church, and such prescription implies that a faculty was originally obtained. (*s*) It has been observed that by means of a faculty a pew can only be granted to the inhabitants of a parish, and it is for the most part limited to a house, a removal from which destroys the right to the pew, and that the same rules would be applicable to a vault; (*t*) and that suggestion is confirmed by a recent decision, in which it was held that a faculty for the appropriation of a vault "to the use

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(*m*) *Ante*, 50, n. (*l*).
(*n*) 2 Bar. & Ald. 806; 1 Chit. R. 288; Willes, 536.
(*o*) Hagg. Rep.
(*p*) 1 Bar. & Adol. 122; 8 Bar. & Cres. 293.

(*q*) 5 B. & Cres. 221; 8 B. & Cres. 288.
(*r*) 8 B. & C. 288.
(*s*) Com. Dig. Cemetery, B.; 8 B. & C. 293.
(*t*) Per Bayley, J. in 8 B. & C. 293.

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of a family so long as they continue parishioners and inhabitants of the parish" will be granted, if it may be done without probable inconvenience to the parish; (*u*) and the court said, "The faculty, however, must be limited in the same manner as faculties for pews, to the use of the family as long as they continue parishioners and inhabitants;" and in this instance it must also contain a clause that the bodies already deposited there shall not be removed. (*x*)

A clergyman has neither by the ecclesiastical law nor by the common law any right to black cloth and other ornaments placed round a pulpit upon the occasion of a burial, but the same belong to the executors or persons at whose expense they were placed there; if taken by the parson or any other, the latter may recover the value in an action of trover. (*y*)

It has been a vulgar error that a creditor may legally arrest or detain and prevent the burial of the dead body of his debtor until paid his debt, but that notion has been refuted by Lord Ellenborough, (*z*) and it is singular how such an error upon so useless and ineffectual an act could ever have been entertained. (*a*) Another error equally erroneous has existed upon the supposition that the permitting a funeral to pass across private grounds creates a public right of way, which doctrine also has long been refuted. The *stealing* of the shroud, coffin, &c., which are the property of the executor or administrator, or whoever incurred the expense of the funeral, is larceny, and indictable. (*c*) But it is clear that no action at the suit of an heir or executor lies for violating or disturbing the remains of the dead, nor is the stealing a corpse a felony, the same being *nullius in bonis*. (*d*) However, the stealing or removal of a dead body, though for the improvement of anatomy, is an indictable misdemeanor, it being contrary to common decency, and shocking to the general sentiments and feelings of mankind; (*e*) but it was questioned whether the apprehension of a person in the act of stealing a dead body from a church-yard was a lawful apprehension, so as to subject such person to an indictment for calling a sexton in order to obstruct such apprehension. (*f*)

(*u*) *Magnay and others v. The Rector, Churchwardens, &c. of the United Parishes of St. Michael & St. Martin, Vintry*, 1 Hagg. Ecc. Cas. 48.

(*x*) *Id. ibid.*

(*y*) So decided at Maidstone summer assizes, A. D. 1825.

(*z*) See Lord Ellenborough's strong observations in *Jones v. Ashburnham*, 4 East's R. 455.

(*a*) It is equally singular that Dr. Johnson, in his "Lives of the Poets," states

the anecdote of a body having been arrested whilst in funeral procession, and a noble lord getting out of his carriage and paying the debt, so as to enable the procession to proceed, without a single comment hinting that the arrest was illegal.

(*c*) 2 East, P. C. 652; 1 Hale, P. C. 515.

(*d*) 3 Inst. 203.

(*e*) 2 T. R. 733; Russ. & Ry. C. C. 366; Dowl. & Ry. N. P. C. 13; R. & R. C. C. 366.

(*f*) R. & R. C. C. 365.

CHAP. II.
II. RELATIVE
RIGHTS.1. Between
husband and
wife. (g)

The *Relative* rights between *Husband* and wife principally depend on the due solemnization of the marriage between them according to law, and which in England must be by *banns* or by *license*. (h) If by *banns*, a notice correctly dated of the day it is delivered, and stating the *true* christian and surnames of both the parties, and of the houses of their respective abodes within the parish or chapelry, and of the time during which they have dwelt, inhabited, or lodged there, (i) must be given to the minister seven days, at least, before the time required for the first publication of such *banns*, and a marriage by *banns* not *truly* stating the christian and surnames of each party is invalid. (j) But the section requiring the consent of parents or guardians is merely *directory*, and the want of such consent will not invalidate the marriage. (k)

To obtain a *license*, the statute 4 Geo. 4, c. 76, s. 14, enjoins the form of oath that there is no existing impediment, and that if either party be under twenty-one the consent of all proper parties has been obtained. But a marriage by *license* between parties, one of whom is a minor, without the consent of parent or guardian, although obtained by false swearing that the party was of age, and contrary to such express regulation, is not void; (l) though the husband, when a party to the violation of the above enactment, is to be deprived of all right to the pro-

(g) See in general 1 Bla. Com. chap. xv. and notes.

(h) 3 & 4 Geo. 4, c. 75; 4 Geo. 4, c. 5, c. 67, c. 76, c. 91; 5 Geo. 4, c. 32, c. 68; 6 Geo. 4, c. 92.

(i) But the 4 Geo. 4, c. 76, s. 26, enacts, that after the marriage has been celebrated the proof of the *actual residence* of the parties at the place described shall be immaterial. *Rex v. Hind*, Russ. & R. C. C. 253.

(j) 4 Geo. 4, c. 76, s. 7, 22. *Rex v. Inhabitants of Tibshelf*, 1 B. & Adol. 194; *Rex v. Inhabitants of Billingham*, 3 M. & S. 257; and in *Wiltshire v. Prince*, a marriage by *banns* of a minor, whose name was *Henry John Wiltshire*, by the name of *John Wiltshire*, omitting *Henry*, for the purpose of eluding detection, was declared void in the Consistory Court, 17 July, 1830. MS. But a second marriage by *banns* in a fictitious name pending the first, although void, will nevertheless subject the bigamist to punishment as such, *Rex v. Penson*, Maidstone, Kent, 13 Dec. 1832, coram Mr. Baron Gurney, who said "that the objection could not prevail; such second marriage was void however solemnized, as the first was a valid one. There was a

marriage *in fact* between the prisoner and the second female, and whether all the forms necessary to constitute a valid marriage, if no previous marriage existed, were not adopted, was of no consequence. If such an objection were allowed to prevail, nothing would be easier than for persons disposed to commit such offences as the present, to have some defect in the forms required by the marriage act, and thus escape from the punishment due to their offence." Verdict, guilty sentence, twelve months imprisonment and hard labour.

(k) 4 Geo. 4, c. 76, s. 16; 8 Bar. & Cres. 29.

(l) *Rex v. Inhabitants of Birmingham*, 8 Bar. & C. 29. The same point was so ruled by Lord Tenterden on an indictment for a conspiracy to marry an infant by a license obtained by the woman falsely swearing her intended husband was of age. *The King v. Jacob and others*, sittings at Westminster, Feb. 1826, and several eminent doctors of civil law advised that the marriage could not be set aside. The uncle of the wife and another defendant were convicted of the conspiracy.

CHAP. II.
II. RELATIVE,
&c.

1. Husband and
wife.

perty of the wife ;(*m*) and a Court of Equity has no discretion to mitigate that penalty, but is bound to settle and secure all property, present and future, of the wife for the benefit of herself or the issue of the marriage. (*n*)

The marriage, whether by banns or by license, is to be celebrated in the presence of *two* or more witnesses besides the minister, and immediately after the celebration, an entry thereof is to be made in the *register-book*, in the form prescribed by the act ; and the wilful making, forging, &c., a false entry in such book is felony punishable with transportation. (*o*) But the omission to make, or untruly making, such register would not invalidate the marriage.

(*m*) 4 Geo. 4, c. 76, 23; *Rex v. Inhabit.*
of Birmingham, 8 Bar. & C. 29 ; and the
King v. Jacobs, ante, 53, note (*l*).

(*n*) *Attor. Gen. v. Mulloy*, 4 Russ. R.
329.

(*o*) 4 Geo. 4, c. 76, s. 28, 29.

The following forms relate to marriages by license or by banns :

Form of oath on
applying for a
license.

Vicar-General's Office, {

(*Date*) day of A.D. 1833.

Appeared personally A. B. of the parish of St. Mary, Islington, in the county of Middlesex, (bachelor,) of the age of twenty-one years and upwards, and prayed a license for the solemnization of matrimony, in the parish church of St. Mark, Kennington, in the county of Surrey, between him and C. D. of the parish of St. Mark, Kennington aforesaid, spinster, of the age of twenty-one years and upwards, and made oath that he believeth that there is no impediment of kindred or alliance, or of any other lawful cause, nor any suit commenced in any ecclesiastical court, to bar or hinder the proceeding of the said matrimony, according to the tenor of such license. And he further made oath, that she the said C. D. hath had her usual place of abode within the said parish of St. Mark, Kennington, for the space of fifteen days last past.

Sworn before me {

E. F., Surrogate. }

Signature, A. B.

Form of license.

William, by Divine Providence, Archbishop of Canterbury, Primate of all England and Metropolitan. To our well-beloved in Christ, A. B. of the parish of St. Mary, Islington, in the county of Middlesex, bachelor, and C. D. of the parish of St. Mark, Kennington, in the county of Surrey, spinster.

Grace and Health. Whereas ye are, as it is alleged, resolved to proceed to the solemnization of true and lawful matrimony, and that you greatly desire that the same may be solemnized in the face of the Church: We being willing that these your honest desires may the more speedily obtain a due effect, and to the end therefore that this marriage may be publicly and lawfully solemnized in the parish church of St. Mark, Kennington aforesaid, by the rector, vicar, or curate thereof, without the publication or proclamation of the banns of matrimony, provided there shall appear no impediment of kindred or alliance, or of any other lawful cause, nor any suit commenced in any ecclesiastical court, to bar or hinder the proceeding of the said matrimony, according to the tenor of this license: and likewise, that the celebration of this marriage be had and done publicly in the aforesaid church, between the hours of eight and twelve in the forenoon. We, for lawful causes, graciously grant this our license and faculty, as well to you the parties contracting, as to the rector, vicar, curate or minister of the aforesaid parish, who is designed to solemnize the marriage between you, in the manner and form above specified, according to the rites of the Book of Common Prayer, set forth for that purpose, by the authority of Parliament. Given under the seal of our Vicar General this twenty-ninth day of November, in the year of our Lord one thousand eight hundred and thirty-two, and in the fifth year of our translation.

John Moore, Registrar.

(L. S.)

By stat. 4 Geo. 4, c. 76, this license to continue in force only three months from the date hereof.

Marriages of British subjects in *foreign* countries are valid, if made according to the local law of those countries; (r) so a marriage in Ireland, performed by a clergyman of the Church of England in a private house, was held valid, although no evidence was given that any license had been granted to the parties; (s) but the foreign law, as well as the compliance with its requisites, must be proved when it is necessary to establish a legal marriage; (t) and in a Court of Equity, where an affidavit verifying the law may be received, it must be made by a professional man, and be positive as to the law, and not to mere hearsay or belief. (u)

The Ecclesiastical Court will not annul a marriage by banns, unless there were fraud in the publication, as by false names used for a fraudulent purpose. (x) And in that court it is not every assumption of a fictitious name that will invalidate, but it must have been assumed for the purpose of defrauding the other party. (y) Error or misrepresentation about the family or fortune of the individual, though produced by disingenuous representations, will not at all affect the validity of the marriage. (z) But under the 4 G. 4, c. 76, a marriage is void where persons knowingly and wilfully marry in any other

CHAP. II.
II. RELATIVE,
&c.

1. Husband and wife.

I publish the banns of marriage between A. B. of _____ bachelor, and C. D. of _____ spinster. If any of you know cause or just impediment why these two persons should not be joined together in holy matrimony, ye are to declare it. This is the first [second or third] time of asking.

Form of publication of banns, see 2 Burn's Ecc. L. 461.

I do hereby certify that the banns of marriage between A. B. of the parish of Orton, in the county of Westmoreland, bachelor, and C. D. of the parish of Ravens-tondale, in the county aforesaid, spinster, have been duly published in the parish church aforesaid, on three several Sundays, to wit, Oct. 27, Nov. 3, and Nov. 10, now last past, and that no cause or just impediment hath been declared why they may not be joined together in holy matrimony. Witness my hand, Nov. 13, 1762.

Form of certificate of publication of banns, see 2 Burn's Ecc. L. 462.

Ri. Burn, Vicar of Orton aforesaid.

A. B. of [the, this] parish, _____ and C. D. of [the, this] parish, _____ were married in this [church, chapel] by [banns, license] with consent of [parents, guardians] this _____ day of _____ in the year 1833,

Form of register of marriage, whether by banns or license, as enjoined by 4 Geo. 4, c. 76, s. 28, and see 2 Burn's Ecc. L. 483.

By me J. J. [Rector, Vicar, Curate.]

This marriage was solemnized between us { A. B.,
C. D.,

In the presence of E. F., G. H.

(r) 10 East, 282; *Cantaur and others v. Teasdale*, 8 Taunt. 830; 2 Marsh. 243, S. C.; *Lacon v. Higgins*, 1 D. & R. Ni. Pri. 38; 3 Stark. R. 176, S. C.; 1 Roper, 337; and see cases under Indictment for Bigamy, Carr. Cr. L. 253, &c.

(s) *Smith v. Maxwell*, Ry. & Mood. C. N. P. 80; 1 C. & P. 271, S. C.

(t) See 1 Roper, on Husband and Wife, 333; Evans's Col. Stat. In *Lacon v. Higgins*, 1 D. & R. Ni. Pri. Cas. 38; 3 Stark. R. 176, it was held, that the validity of a marriage celebrated in a foreign country, must be determined by the *lex loci*

where the marriage was solemnized. And a printed copy of the *Cinq Codes* produced by the French vice-consul resident in London, purchased by him at a bookseller's shop at Paris, was received as evidence of the law of France upon which the courts here would act.

(u) *Hill v. Reardon*, Jacob's R. 89, 90.

(x) 1 Phil. Ecc. C. 133, 298, 224, 230, 375; 2 Phil. Ecc. C. 14, 104, 367.

(y) 3 Mau. & Sel. 250; 1 Phil. 47; 2 Phil. 12; but see 1 B. & Adolp. 144.

(z) *Wilson v. Brockley*, 1 Phil. E. C. 137.

CHAP. II.
II. RELATIVE,
&c.

1. Husband and
wife.

place than a church or chapel wherein banns may be lawfully published, unless by special license; or *knowingly* and wilfully intermarry without due publication of banns, or license from a person having authority to grant the same; or knowingly and wilfully consent to solemnization of marriage by a person not being in holy orders. But in all other cases of fraud or false swearing, or other irregularity, the *marriage itself is valid*, though the parties offending are liable to punishment, and a forfeiture of property. The 10th section prohibits any license being granted to solemnize any marriage in any other church or chapel than the parish church or chapel, &c. belonging to the parish, &c. wherein such person shall have been resident fifteen days immediately before granting such license. It is not necessary that the license should contain any description of the parties. (a) The 26th section provides, that proof of actual residence of the parties is not necessary to the validity of the marriage, whether after banns or by license. (b) The 30th and 31st sections provide, that the act shall not extend to the royal family, or to marriages of Quakers or Jews. (c) And by the 53d section the act extends only to England, and marriages on elopements to Scotland are valid. (d)

In an action for criminal conversation, and in support of an indictment for bigamy, an actual marriage according to law must be proved. (e) But in an action of trespass by husband and wife, for the battery of the wife, it is sufficient to prove mere reputation of marriage, (f) and that evidence *a fortiori* suffices in an action against the supposed husband for necessities furnished for the wife.

A *verbal promise* to marry is sufficient, notwithstanding the statute against frauds, to subject a party to an action for the breach; (g) and when in writing it need not be stamped; (h) and a bill lies to compel a party to admit his promise to marry. (i) A promise of marriage *by* an infant does not subject him to an action, though a promise *to* an infant enables the latter to sue for the breach. (k) No bill in equity or other proceeding lies

(a) *Mayhew v. Mayhew*, 2 Phil. E. C. 13.

(b) See *Tree v. Irwin*, 2 Phil. E. C. 14.

(c) See *Jones v. Robinson*, 2 Phil. E. C. 285; Sel. N. P. Adultery, 3, notes 15, 16.

(d) Bul. N. P. 113; and *Dodson's Rep.* of Sir Wm. Scott's judgement in *Dalrimple v. Dalrimple*, and 1 Ves. & B. 112,

114; 2 Hagg. 54; 1 Rep. 334; Selw. N. P. Adultery, 3, note 14.

(e) 4 Burr. 2057; Phil. Ev. 7th ed. 206; Selw. N. P. 14, 16.

(f) 1 Stra. 480.

(g) 1 Stra. 34; 1 Ld. Raym. 316.

(h) 2 Stark. R. 351.

(i) *Forrest's R.* 42.

(k) 2 Stra. 937; 2 M. & S. 205; 6 Taunt. 118.

to compel the specific performance of a promise to marry, (l) and a discovery that the intended husband or wife is of bad character, is of itself a sufficient legal excuse for rescinding the engagement, though a mere suspicion of the fact is not. (m) In order to support an action for the breach of a promise of marriage, there must be evidence of an *offer* to marry on the part of the plaintiff, and of a *refusal* by the defendant, or there must be proof that the latter dispensed with any formal offer by declaring that it would be unavailing; as where the plaintiff's father went to the defendant and asked him if he meant to fulfil his engagement to his daughter, and he replied "certainly not," this will suffice, and render any other offer or request unnecessary. (n)

When there is considerable property in possession or expectancy, it is usual by *marriage settlement*, or at least by articles, to vest the property in trustees upon specified terms, usually for the benefit of the husband during their joint lives, and then for the benefit of the survivor for life, and afterwards for the benefit of children. If the feme fraudulently, after the commencement of a courtship followed by marriage, conceal her property from her husband, and have it conveyed to separate uses for her own benefit or at her disposal, the husband, even after ten years' delay, and after her death, may by bill in equity recover such property. (o) If, as usual, by the terms of the marriage settlement the wife is to be *absolutely* entitled to jointure, she does not forfeit it by adultery, (p) though she would, independently of such jointure, forfeit *dower* and all right to maintenance, (q) and by express stipulation, jointure and separate maintenance may be forfeited by any prohibited intercourse with a third person. (r) Parties, before they marry, should well consider the proper terms of settlement, to prevent subsequent

CHAP. II.
II. RELATIVE,
&c.

1. Husband and
wife.

Settlements.

(l) 4 Geo. 4, c. 76, s. 27.

(m) Holt's C. N. P. 151; 4 Esp. R. 256; 1 Car. & P. 529.

(n) 2 C. & P. 634; 2 D. & R. 55. If the intended defendant wholly withhold any communication whether he will fulfil his promise, then it may be necessary for some friend of the lady to address a letter to him, fixing and notifying time and place for celebrating the marriage ceremony, and that the lady will attend accordingly at some named house in the neighbourhood of the church ready to proceed there, and which notice should be accompanied with a request, that in case such time and place will not be convenient to him, then that he will appoint and notify some other time and place, within a

named period; and in case he should still remain silent, it may be expedient to obtain a license, and that the lady attend at the first-named time, place, and house, ready to complete the ceremony, the clergyman being requested to be ready at his parsonage to attend upon notice. If the promiser should take no notice of the appointment, nor attend, then the cause of action will be complete.

(o) 1 Russ. R. 485.

(p) 3 Cox's P. Wm. 277; 2 Bar. & C. 547; 4 D. & R. 11.

(q) 1 Stra. 647; 2 Stra. 706, 875; 6 T. R. 603; 1 B. & Adolp. 227.

(r) *Lord Dormer v. Knight*, 1 Taunt. 417.

CHAP. II.
II. RELATIVE,
&c.

1. Husband and
wife.

Deeds of separation
illegal.

discussion, so injurious to family union and harmony; and though it might be difficult for the intended husband to suggest the possibility of the lady's frailty, it would be expedient for his friends or professional adviser to provide for the possibility of so disastrous an event. (s)

When once the contract of marriage has been solemnized, it is not legally competent for either party to bind themselves by a deed of separation; and no legal separation can take place except by act of parliament (that by sentence of divorce in the Ecclesiastical Court being only a *mensâ et thoro*), and though it has been frequently decided otherwise at law, (t) it appears now to be settled by the decision of the House of Lords that a prospective or any deed of separation (excepting so far perhaps as it may provide for children), is invalid, and may be set aside or treated as void. (u) This most important decision materially alters the supposed law relative to deeds of separation, and in other collateral respects.

A covenant not to sue for restitution of conjugal rights would

(s) Jointure or pin money should be made payable only *dum casta se gesserit*, or to that effect, or that it shall continue payable only so long as the husband shall have no just cause to sue for a divorce; or it should be provided, that if the wife do any act which would forfeit dower, the whole jointure, or all but a small part, sufficient merely for maintenance, should cease. Such a stipulation would remove one powerful temptation to a profligate seducer, whilst the unqualified right to pin money or large jointure is calculated to render many women too self-sufficient and independent of their moral duties towards their husbands, and the certain ability to support their seducer frequently leads to the completion of ruin, which but for that temptation might be prevented by mere prudential considerations. The intended husband himself might not venture to suggest such a qualification, which might suppose his suspicion of the character of his intended, but his professional adviser might insist upon the propriety of the stipulation, and no part of the lady's family could well take umbrage, for women as well as men may be perfectly virtuous and wholly averse to vice, at one period of their lives, when by circumstances they may at another become more prone to err, and may require protection even against themselves; and all marriage settlements should be so framed as to guard against future indiscretion, as well of the wife as of the husband. Adultery forfeits all right to maintenance and all right to dower at common law, and there is no reason or principle why jointure should not also be

forfeited; 1 B. & Adolp. 227. As, however, upon a divorce in the Lords, on account of adultery of the wife, the husband is always required to make provision for her maintenance, lest by total destitution she should be driven to continue in a course of vice, it would be expedient to provide in the settlement in any event for a small allowance for that purpose; 4 D. & R. 17.

(t) 2 Bar. & Cres. 547.

(u) *Westmeath v. Westmeath*, 1 Dow. R. New S. 519; Jacob's R. 141, S. C.; *Hendley v. Westmeath*, 6 Bar. & Cres. 200; *Durant v. Titley*, 7 Price, 577. It was held by the House of Lords, "That according to the law of this country, marriage, as far as concerns the *vinculum matrimonii*, is indissoluble, and can only be dissolved by act of parliament. The contract between husband and wife is of the most solemn and sacred nature, not merely as regards themselves, but with reference to their children; and it is by so much the more strange, that the doctrine should have prevailed, that the parties might, by agreement between themselves, destroy all the duties and obligations of that important and sacred contract, not only as respected themselves, but their offspring also." *Westmeath v. Westmeath*, 1 Dow. R. New S. 519. This decision confirmed the reasoning of the Chancellor in the Court of Chancery, in Jacob's Rep. 141, 142, 143; and overruled *Eluorth v. Bird*, 2 Sim. & Stu. 372, in equity; and *Lee v. Thurlow*, 2 Bar. & Cres. 547, and other cases at law, in which actions on covenants or deeds of separate maintenance were sustained.

be equally invalid as a deed of separation. (v) Ecclesiastical Courts will not divorce on account of bad temper, harshness, or insulting language, except when accompanied with actual or threatened personal violence; on the principle that when people understand that they *must* live together, they learn to soften, by mutual accommodation, that yoke which they know they cannot shake off; they become good husbands and good wives from the necessity of *remaining* husbands and wives; necessity being a powerful master in teaching the duties which it imposes. (x) And therefore the only sufficient grounds of separation are *adultery* or *intolerable cruelty*, or guilt of an *infamous crime*, (y) or *pre-existing* disabilities, which are considered as equivalent to frauds. Nor can a husband obtain a divorce on account of the adultery of his wife, if she recriminate and establish a cross charge. (z)

CHAP. II.
II. RELATIVE,
&c.

1. Husband and wife.

As regards the protection of the person of the wife from injury by *third* persons, the same remedies and punishments are provided on *her* behalf as in the case of single individuals, excepting that in all civil proceedings her husband must be a party. But besides these, the husband has his separate rights by virtue of the marriage. He may justify the defence of his wife by force, and when the wife's life or person is in danger he may even kill the assailant, (a) and if she be injured so as to occasion his loss of her society or assistance, or expense, he may sue *per quod consortium amisit*, &c. (b). In respect of his interest in her fidelity and assistance, he may sue for criminal conversation, and if he were to detect the wrong-doer *flagrante delicto*, the instantly killing him would at most constitute manslaughter. (c) If she be taken away or harboured she may be retaken, and he may have an habeas corpus, unless he has been formally separated; (d) or an action, after demand and refusal, may be supported for the detention. (e) If her chastity be solicited, the offender may be prosecuted in the Ecclesiastical Court; (f) or if there were a conspiracy to effect the same object, the parties may be indicted; (g) and a suit may be instituted by her husband against her for restitution of conjugal

Protection, &c.

(v) Id. 1 Jacob's R. 187.

(x) *Per* Sir William Scott, in *Evans v. Evans*, 1 Haggard's R. 36; and see *Oliver v. Oliver*, Id. 364; *Kirkman v. Kirkman*, Id. 409; *Holden v. Holden*, Id. 458; *Harris v. Harris*, 2 Hagg. R. 148; *Warring v. Warring*, Id. 154, 168; 2 Phil. Ec. Cas. 132, S. C. 2 and *per* Dr. Lushington, in *Neeld v. Neeld*, 6 Dec. A. D. 1831; and see selections from those cases in 3 Bla. Com. by Chitty, 94, 95, in notes.

(y) 3 Bla. C. 94, note (15); and see

Mr. Christian's note of a decision to that effect, Feb. 1792, *ante*, 41, note (f).

(z) 1 Ought. 317; Burn's Ecc. L. Marriage, XI.; see 1 Bla. Com. by Chitty, ch. xv., and notes *per tot.*

(a) 2 Rol. Ab. 546; 3 Bla. C. 3.

(b) 3 Bla. C. 140.

(c) 1 Hale, 486; T. Raym. 212.

(d) *Rex v. Mead*, 1 Burr. 342.

(e) Willes' Rep. 578; 6 T. R. 221.

(f) 1 T. R. 6; 3 Bla. C. 645.

(g) 3 State Tr. 519.

CHAP. II.
II. RELATIVE,
&c.

1. Husband and
wife.

Rights of wife.

rights, and the sentence is in effect perpetual imprisonment until she submit. (*h*)

A wife also, notwithstanding her coverture, *has* in all cases some *rights*, even as *against* her husband, and the injuries to which are remediable even at law. If her husband, by ill usage or threats, place her life or person in danger, she may obtain sureties to keep the peace, either by application to a justice of the peace or at the Sessions, or to the Court of King's Bench, or to the Chancellor by articles of the peace and supplicavit; (*i*) and she may even subject her husband to the payment of an attorney's bill in enforcing such security against him, the same being considered necessary; (*k*) and his implied contract to pay is therefore so violently presumed, that no evidence to the contrary will be admissible. So, an habeas corpus may be obtained at her own instance, if under *improper* restraint (though not at the instance of others,) to make her will or an appointment of her property. (*l*) She may also subject him to liability for necessities, by purchasing them on his credit, if wrongfully withheld, (*m*) though not if she voluntarily leave her husband without adequate cause, such as cruelty, (*n*) nor if she be guilty of adultery; (*o*) or she may obtain an order of maintenance from magistrates, unless guilty of adultery; (*p*) or she may compel restitution of conjugal rights, by suit in the Ecclesiastical Court, (*q*) and alimony may be obtained in that court, (*r*) and which is also allowed by the legislature in passing a divorce bill on account of the adultery of the wife, for otherwise, from want, she might be driven to continue in a course of vice. (*s*) If a wife sue her husband in the Consistory Court, and obtain a decree for alimony, and the husband then remove the cause into the Arches Court, the decree ceases to be legally binding, and a new decree for alimony must in strictness be obtained, but which will be granted by a short process without any fresh allegation of faculties, if the husband discontinue paying the alimony. (*t*) If, under such circumstances, the husband continue making payments under such inoperative original decree, he will not be liable also to be sued at law for necessities supplied to the wife while such payments

(*h*) 3 Bla. C. 94.

(*i*) Tunnickliff's Case, 1 Jac. & Walk. 348; and post, ch. viii.

(*k*) 3 Campb. 326; 1 McClell. & Y. 269; 1 P. Wms. 482.

(*l*) 15 East, 173; 1 Chit. R. 654; 1 Jac. & W. 94.

(*m*) 2 Stra. 1214; 3 Bar. & Cres. 631.

(*n*) 2 Stra. 1214; 2 Stark. R. 87.

(*o*) 4 Bar. & Adol. 227.

(*p*) Id. ibid.; 5 Geo. 4, c. 83, s. 3.

(*q*) 3 Bla. C. 94.

(*r*) 1 Bar. & Adolp. 851; 1 Bla. C. 441; 3 Bla. C. 94.

(*s*) 4 Dowl. & R. 17.

(*t*) 1 Bar. & Adolp. 801, 802.

were going on, though, if no such original decree of alimony had been made, the payments might have been considered voluntary; and in the latter case, a Court of Law and jury might inquire and determine whether or not the payments were sufficient in proportion to the husband's means.^(u)

A married woman also may acquire *beneficial* interests in property quite independently of her husband, by the intervention of trustees, either before or after marriage; and in that case, in a Court of Equity, she is considered in respect of that property as a *feme sole*, so that she may by her contract (considered as an appointment of the property) charge it; and it is settled, that if a married woman give a bond or bill for a debt of her own, or of her husband or other person, her separate property will be liable in equity to pay it; ^(v) though at law she can in no case be sued upon a contract entered into by her during coverture, unless her husband be *civiliter mortuus*, as where he has been transported; ^(w) though, if after the death of her husband, she expressly promise to pay, in consideration of forbearance of a suit against her in respect of her separate estate, she might be sued upon such promise even at law. ^(x)

In general, every contract made with, or security given to a married woman, vests in her husband, and he may sue alone to enforce the contract; ^(y) but if a note be given to a married woman as administratrix, even by her husband and others, then, after her husband's death, she may sue the latter. ^(z) If a gift or legacy, whether specific or otherwise, be given to a married woman "*for her own use, and at her own disposal*," without other words, this vests the beneficial interest separately in her; ^(a) and, in these cases, if no other trustee be appointed, a Court of Equity will treat the husband merely as a trustee, and compel him to act accordingly.

The rights between parent and child result only from *legal* marriage, though, in some cases, as in that of a marriage between persons too nearly related, the children are legitimate, unless the marriage be decreed void by the Spiritual Court during the joint lives of the parents. ^(b) In general, it is a settled rule, that a child born before marriage, whether in Scotland or England, does not become legitimate by subsequent

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&c.

1. Husband and wife.

2. Parent and child.

(u) 1 Bar. & Adolp. 801, 802.
(v) 17 Ves. J. 366; 1 Bro. P. C. 16;
3 Madd. R. 387; *Bingham v. Jones*, at
Rolls, A. D. 1832; Chitty on Bills, 8 ed.
791; 4 Russ. R. 112.
(w) 8 T. R. 515.

(x) 5 Taunt. 362; 1 Bar. & Adolp. 811.
(y) 10 Bar. & C. 558.
(z) 2 Bar. & Adolp. 447.
(a) 1 Turner and Russel's R. 222.
(b) Cro. Jac. 186; 7 Co. 43; 1 Bla. C.
440.

CHAP. II.
II. RELATIVE,
&c.

2. Parent and
child.

marriage of the parents, so as to enable such child to inherit lands in *England*; (c) and the term "*child*," in a deed or will without other words, is always considered as confined to "*legitimate children*." (d) And, therefore, although an illegitimate child has been expressly named and described in a will as "*Elizabeth, the daughter of A. B.*," yet if a subsequent independent bequest of the residue to all the *children* of A. B. generally, without expressly repeating the name of such illegitimate child, she could not take any part of the residue. (e) Hence the necessity for great care in bequests to illegitimate children, very distinctly to designate the precise objects, and also to provide for the maintenance of such children until they attain full age.

Registers and
entries of mar-
riages, births,
&c.

For *legal* purposes, *registers* of marriages, births, christenings, and deaths, are not essential in trial; and important only to *assist in evidence* in case of future discussion, whether or not the event has taken place; and they are only receivable in evidence when made by recognized authority; and it has been held, that the entry of the birth of a dissenter's child, in a register kept for that purpose at a public library, is not evidence; and entries in the Fleet books are not received except as declarations, nor an entry in the register of an ambassador's chapel; and Lord Kenyon is said to have rejected a register of baptism in Guernsey, on the ground of the ecclesiastical jurisdiction not extending to that island. (f) Shortly after the *birth* of a child, it is expedient, though not legally necessary, to *register* in the parish books the time and place of its birth and name, and sometimes the particular additions of his parents, and to have two or more young and disinterested relations to write their names, attesting the truth of the entry; to which, for purposes of pedigree, resort may afterwards be had in evidence. But such entry in the parish books will not be in general allowed, unless a regular christening has taken place, upon which certain fees are paid, and which may be one reason why the production of the entry made by proper authority, or of a verified copy, may be received as *prima facie* evidence of a

(c) 4 Wils. & Shaw, 289; 5 Bar. & Cres. 438. The attempt to alter this rule gave rise to the celebrated declaration of the Barons, "*Notimus leges Angliæ mutari.*"

(d) 1 Russ. & Myl. 581; *Harris v. Lloyd*, 1 Turner & R. 313, 314, where the Chancellor said, "I have not the least doubt that this testator by the words 'all and every the child and children of my son, S. H.,' meant his illegitimate children;

but I am clearly of opinion, that there is not enough upon the face of the will to authorize me to carry that intention into effect." And see 5 Vesey, 530.

(e) 1 Russ. & Mylne, 581; but see *Wilkinson v. Adams*, 1 Vesey and Beames, 469; and see *Harris v. Lloyd*, 1 Turn. & Russ. 310.

(f) *Ex parte Taylor*, 1 Jac. & W. 483, and cases there cited.

regular christening having taken place at the time therein mentioned. But it has been held, that a statement in the entry of the time of the *birth* is not of itself evidence to fix the precise time of that event, because such entry being a mere statement of a past or bygone event, affords mere hearsay proof; (*h*) and the evidence of the mother or the month nurse, or other attendant, is in general required to prove the precise time of *birth*, especially as juries are frequently much inclined not to give effect to a plea of infancy. It is advisable also, to make a correct *entry* in the family Bible of the births and other family events, and have the same simultaneously attested by two or more relations, because they are generally received as genuine evidence, when made by parents at or about the time of the birth, even when made under suspicious circumstances; and the suggested witnesses may refresh their memory, and give more certain and positive evidence as to the precise date, by referring to their own recognized entry made at the very time. (*i*)

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II. RELATIVE,
&c.

2. Parent and
child.

A father has such an interest in the *person* of his child, that at any age he may justify his defence even by forcible means. (*k*) He has a right to the custody of his infant son and daughter, and may legally retake them, and may have an *habeas corpus* to restore such custody, (*l*) and may support trespass for taking him away, or detaining or injuring him, or debauching his female child whilst generally resident with him *per quod servitium amisit*, (*m*) but not in respect of the mere parental right; (*n*) and for merely taking away or injuring a child, no action can be supported, unless it occasion an actual loss to the parent, for in strictness no damages are recoverable in any case for an injury merely to parental feelings; (*o*) and yet it has been held to be no ground for a new trial that the judge, in an action for debauching a daughter, admitted evidence of a promise of marriage, though such proof probably increased the verdict, without evidence of any real greater damage to the parent in the character of master. (*p*) So the taking away a daughter under the age of sixteen, (*q*) or the stealing of a child under the age of ten years, (*r*) are punishable, the former as a misdemeanor, the latter as a felony.

Defence, &c.
of a child.

(*h*) 3 Stark. Rep. 63; 5 Bar. & Cres. 508; Roscoe Ev. 92, 93, 195, 196, 197.

(*i*) See a strong case, *Berkeley's case*, 4 Campb. 401; Cowp. 591.

(*k*) 2 Rol. Ab. 546.

(*l*) 4 Moore, 366; 7 East, 579.

(*m*) 3 Burr. 1878; 6 Esp. R. 32.

(*n*) 4 Bar. & Cres. 660; 3 Bla. C. 140, note (28), and 143, note (30).

(*o*) *Flemington v. Smithers*, 2 Car. & P. 292; 4 B. & Cres. 660; 7 Dowl. & R. 133, S. C.

(*p*) 3 Wils. 18.

(*q*) 9 Geo. 4, c. 31, s. 20, *ante*, 40.

(*r*) *Id.* s. 21, *ante*, 41.

CHAP. II.
II. RELATIVE,
&c.

2. Parent and
child.

Controul over
parents.

The parent has also in general a right to direct and controul the education and care of his child, as to compel him to receive his education at a particular school or college, and to delegate that care to other proper persons, and a Court of Equity will lend its aid so as to enforce obedience; (s) and it is an established doctrine that a *parent* may justify the correction of his child either corporally or by confinement; and a *schoolmaster*, under whose care and instruction a parent has placed his child, may equally justify similar correction. (t) But the correction must be moderate, and in a proper manner. (u)

At law the judges will, upon an habeas corpus, interfere when the father has been guilty of cruelty or personal ill usage to his child, but unless there is some circumstance of that nature, the judges at law will not interfere. (x) But in Courts of Equity, especially upon a bill filed, or where a suit is pending in that court, a much more extensive jurisdiction and controul over parents exists and is exercised. Such jurisdiction has long been exercised, but was not finally established until the recent decision in the House of Lords, by which it was settled that the Chancellor may not only controul the father's power over, but even his intercourse with his children, in all cases where, in the exercise of his sound discretion, he thinks it essential for the interests of the infant that he should so interfere; as where the parent is guilty of gross immoral conduct, and inculcating bad principles into his child. (y) The King is the *parens patriæ*, and the Chancellor representing him has jurisdiction over the care of every infant in the kingdom, although, as it has been judicially observed, the Court of Chancery only, in fact, exercises jurisdiction over infants *having property*, because the court has not funds of which it could take upon itself the *maintenance* of all the children in the kingdom. (z) Nor is the exercise of this essential jurisdiction limited to instances in which the conduct of the parent has been cruel or immoral; it is also exercised in cases in which their general education or their pecuniary interests are concerned. (a) And such regulations may be imposed as, under each particular case, may be

(s) 1 P. Wms. 702; 2 P. Wms. 117; 4 Bro. C. C. 101, *post*.

(t) Com. Dig. Pleader, 3 M. 19; Hawk. c. 60, s. 23, and c. 62, s. 2,—ch. 29, s. 5. See valuable observations of Dr. Johnson on the right of a *schoolmaster* to correct his pupil, upon which Boswell made an able argument in the House of Lords in defence of his client, in Boswell's Life of Johnson. But a master has no right to flog a choir boy of a cathedral for

singing at private parties without his leave. MS.

(u) Id. *ibid*.

(x) See 1 Jacob's Rep. 254, note (b).

(y) *Wellesley v. Wellesley*, and *Wellesley v. Duke of Beaufort*, 1 Dow. Rep. New S. 154; 2 Bligh's Rep. New S. 124; 2 Russ. R. 1; 2 Simon's R. 35; 1 Jacob's R. 245.

(z) Per Lord Chancellor, in *Wellesley v. Duke of Beaufort*, 2 Russ. R. 21.

(a) 1 Jacob's R. 245, 254, 264, note (b).

best for the interests of the child, without unnecessarily interfering with the paternal rights of the parent. (b)

Where a father applied to the Court of Chancery, praying that his three female children, aged nineteen, fourteen, and twelve, might be delivered up to him by an aunt, who was guardian of their fortunes, under the will of their grandmother, with a discretionary trust for their maintenance, and with whom he had permitted them to reside for a long time, the court under the circumstances refused the application, although there was nothing established against the moral conduct of the father; but it appearing that his situation was such that he could not educate the children in a manner suitable to the property which they derived from the bounty of their grandmother. (c) With respect to the mode of exercising this jurisdiction, although the Chancellor may have jurisdiction upon a writ of habeas corpus, yet it is preferable to proceed by petition, or to constitute the infant a ward of court. (d)

If the father withhold *maintenance*, a magistrate may make an order of maintenance, observance of which may be enforced, or the violation punished by indictment; (e) and if a father withhold proper necessities from his infant child incapable of supporting itself, he might be indicted for his neglect at common law. (f) But the mother, whilst her husband is living, could not be indicted, because she is not legally bound to provide necessities. (g) And no action for necessities can be sustained against a parent (as it may against a husband) unless there has been a contract to pay it, (h) which, however, is usually inferred upon very slight evidence. Where proper maintenance and education are withheld by a parent from a child in the higher ranks of society, the only efficient remedy is by application to the Court of Chancery. (i)

Gifts, bequests, or devises to infants by relations or friends, are too frequently made quite independently of the controul of the parents, and even without any condition, and hence the demoralization of so many young men, who at too youthful an age are induced to consider themselves independent of their parents, and so far from being influenced by their moral injunctions,

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II. RELATIVE,
&c.

2. Parent and
child.

Compelling
maintenance,
&c.

Donations to
children.

(b) 1 Jacob's R. 245, 254, 264, note (b), where see several instances of particular modifications. *

(c) *Lyons v. Blenkin*, 1 Jacob's R. 245.

(d) Id. 254, note (b).

(e) 43 Eliz. c. 2, s. 7; *Burn's J. Poor*; 1 Russ. R. 23.

(f) *Rex v. Friend and wife*, Russ. & Ry. C. C. 20; *Rex v. Ridley*, 2 Campb.

630; *Rex v. Squire and wife*, 1 Russ. C. C. 16.

(g) Id. *ibid*.

(h) 4 East, 84; 5 Esp. R. 131; 1 Car. & P. 1, 5; 2 Car. & P. 82; 7 Dowl. & R. 612.

(i) *Wellesley v. Duke of Beaufort*, 2 Russ. R. 23.

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II. RELATIVE,
&c.

2. Parent and
child.

scarcely treat them with ordinary respect. No such unqualified donations should be made or allowed to have effect, and the actual receipt of any benefit should be made to depend upon proper conduct towards parents and guardians, whether testamentary or appointed by the Court of Chancery, until an age when the influence of education and habit will probably have secured the continuation of good conduct.

When a parent, relation or friend, apprehends that the improvidence of his donee may dissipate any property given to him, he may by *very express terms* in his deed or bequest, so modify his donation as to prevent the benefit passing to creditors; but very great care must be observed to introduce such express terms as will legally operate to deprive the creditors of their general right to the distribution of their debtor's property. (h) Where a bequest of the dividends of stock to a nephew was *solely for the maintenance of himself and his family*, declaring that such dividends should not be capable of being charged with his debts or engagements, and that he should have no power to charge, assign, anticipate or encumber them; and that if he should attempt so to do, or if the dividends, by bankruptcy, insolvency or otherwise, should be assigned or *become payable* to any other person, or be, or become applicable to any other purpose than for the maintenance of the nephew and his family, *his interest therein should cease, and the stock be held upon trust for his children*, and afterwards the nephew took the benefit of the Lords' Act, (1 Geo. 4, c. 119,) and some years afterwards the testator died; it was held, that such insolvency, under the latter terms of the bequest, operated as a forfeiture of the life interest given to the nephew by the will. (i) But if in a bequest to trustees, for the benefit of a son, there be *merely a prohibition* against *his* alienation, without any clause of *cesser* or *bequest over*, then if he become bankrupt his assignees will be entitled. (k) And so if the clause of forfeiture extend only to alienations *in fact*, and do not provide against alienations by operation of *law*, then also if he become a bankrupt his assignees will become entitled. (l) The clause may be, that in the event of any commission of bankruptcy, or any discharge under an insolvent act, or even of process issuing, the annuity shall cease; or in the same form as in

(h) See a form in 6 T. R. 644, and other cases cited 1 Russ. & Mylne's R. 568; where it was held, that in consequence of the *express* stipulation, creditors

took no interest.

(i) 1 Russ. & Mylne's R. 364.

(k) Id. 395.

(l) Id. 690.

clauses of re-entry in leases in case of insolvency, and as also as in the other cases above referred to.

It may be proper here to notice some rules observed in Courts of Equity, in giving or refusing effect to what are termed "*family arrangements*," and by which, between a father and a son, or between brothers, an agreement has been made to dispose of property in a different manner to that which would otherwise take place. In these cases frequently the *mere relationship* of the parties will give effect to bargains otherwise without adequate consideration, and though it is an established principle of Courts of Equity, that in dealings between attorney and client, guardian and ward, and in the purchase of reversionary interests, the purchaser is bound to show that he has given the full consideration,^(m) yet in *family arrangements* it is otherwise. The Court will not view transactions between father and son in the light of reversionary bargains, but will regard them as *family arrangements*, though with a reasonable degree of jealousy, so as to prevent the influence of a father surprising his child, when just of age, into an improvident arrangement; and they will not look into all the motives and feelings which might actuate the parties in entering into such arrangements. There may be considerations in such cases which the Court could not possibly reach. It might be conducive, for instance, to the best interests of the parties, the son as well as the father, that the father should be enabled to educate all his younger children in a liberal way, and which might justify his requiring his eldest son to give up part of his interest for that purpose, so that his brothers and sisters may be so brought up and educated, and placed in such situation as to do him credit in the world.⁽ⁿ⁾ And therefore, where a father being tenant for life, with remainder over to his first and other sons successively in tail male, persuaded his eldest son, soon after he attained twenty-one, to join in a recovery, and an annuity was secured to him during his father's life, and parts of the estate were limited to the father in fee, and the residue of them were resettled, the son taking back an estate for life, with remainder to his first and other sons in tail general, remainder to his daughter in tail general; it was held, that this transaction was to be considered as a mixed case of bargain and sale, and of family arrangement, and, that the eldest son having died without issue, his brother was bound by the

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II. RELATIVE,
&c.

2. Parent and child.

Family arrangements, when sustained in equity.

^(m) 6 Ves. 266; 17 Vcs. 20; 1 Turn. & Russ. 9.

⁽ⁿ⁾ Per Lord Chancellor, 1 Turn. & Russ. 13.

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II. RELATIVE,
&c.

2. Parent and
child.

arrangement, and the Court of Chancery refused to set aside the settlement as obtained by undue influence. (o) So an agreement between two brothers to divide equally whatever property they might receive from their father in his life-time, or become entitled to under his will, or by descent or otherwise from him or from a third person, is not contrary to public policy, but will be enforced in equity, though it was insisted that it was a fraud upon the intention of the father or third person, to divide that which he might intend one alone should solely enjoy, for the latter might, if he thought fit, have so qualified his donation by express restriction, and not having done so, he left his donee at liberty to do with the property as he thought fit. (p) So in equity, where an agreement has been made in consideration of natural love and affection, or from meritorious motives to save the peace and honour of a family, as with a view to conceal the illegitimacy of an eldest son born before marriage, and his brother afterwards, the execution of it will be decreed. (q)

Child's property.

With respect to *the property of his child*, a parent acquires no interest therein whilst living, and is, if of sufficient ability, bound to maintain such child, though the latter have separate property; but if the father be not of ability to maintain or educate his child on a scale according with such separate property, then, if the infant's income arise out of personal estate, and do not exceed 300*l.* per annum, or if the aggregate income of two infant children do not exceed 600*l.* per annum, the Court of Chancery will, on his or their petition for the allowance of maintenance, and without any formal *bill* being filed, and on its being established that the father is not of sufficient ability, order such proper allowance for maintenance as the Master shall approve; (r) but when the income proceeds from *real* property, maintenance has been refused upon petition without bill, unless the yearly income be under 100*l.* (s) Where a father has deserted his child, and is not of ability to maintain him, the Court of Chancery will, on petition, make an order referring it to the Master to approve a proper person to act in the nature of a guardian, and to inquire whether it will be for the benefit of the infant that a certain sum should be raised out of the property to which he is absolutely entitled under a will, and upon the Master's report that it is for his benefit, and with the consent

(o) *Tweddell v. Tweddell*, 1 Turn. & Russ. 1.

(p) *Wethered v. Wethered*, 2 Sim. 183; and *Harwood v. Took*, Id. 192.

(q) 1 Atk. 2; 2 Ves. 11; and 1 Foulb.

Tr. Eq. 272.

(r) *Ex parte Larkin*, 4 Russ. 307.

(s) *In re Sir Wm. Molesworth*, 4 Russ. R. 308.

of the executors of that will, the court will order the sum to be raised accordingly, as for the purpose of sending the child over to the East Indies, where his mother resided and was willing to maintain him; but the court would not order the reimbursement to the executors of a sum *previously* expended without the order of the court, though for necessities. (*t*) But where their mother, who had no fortune, had incurred debts in maintaining her children, an order was made for the payment of such debts out of their property; (*u*) and a prospective order was made for payment of necessities and education out of dividends, though the principal did not vest till the infants came of age. (*x*)

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II. RELATIVE,
&c.

2. Parent and child.

The *rights* between guardian and ward much resemble those between parent and child. A father may, by 12 Car. 2, c. 24, appoint a testamentary guardian, and it may be advisable therein to prescribe the course of education, unless the parents prefer reposing entire and unlimited confidence in the discretion of the guardian. (*y*) The Court of Chancery will assist a guardian in compelling his ward to obey his legal desires, and where an infant persisted in going to Oxford University instead of Cambridge, contrary to the direction of his guardian, the court sent a messenger to compel his return to Cambridge, (*z*) It has been considered to be an indictable offence at common law, and, independently of the above statutes, to abduct a ward from the custody of the guardian with intent to marry her, (*a*) and the marrying a ward subjects the husband to imprisonment in the Fleet, (*b*) and from which he will not be released without making a proper settlement; (*c*) and such release does not necessarily follow even after a proper settlement has been made, (*d*) nor even on the husband's attaining age. (*e*)

3. Guardian and ward.

If the guardian misconduct himself, he may be removed. (*f*) A guardian having the delegated controul over his ward, may legally detain her clothes, if he discover that she is about to

(*t*) *In re England*, 1 Russ. & M. 499.

(*u*) *Ex parte Swift*, 1 Russ. & M. 575.

(*x*) *Ex parte Chambers*, 1 Russ. & M. 577.

(*y*) See 3 P. Wm. 51, *post*, where, from want of express direction in the will, a suit in Chancery became necessary, the father, a Presbyterian, having appointed a clergyman of the Church of England and two Presbyterians testamentary guardians to one of his children, and the former thinking it his duty to inculcate church principles, and the two latter their own, and the Chancellor decreed in favour of the latter, the other near relations of the child being Presbyterians, and the presumption being that the testator must

have intended that the child should be educated in the same.

(*z*) 1 Stra. 167; 3 Atk. 721.

(*a*) 1 East's P. C. 459.

(*b*) 8 Ves. 274; 3 P. Wms. 116; 5 Ves. 15; 6 Ves. 572; 16 Ves. 259.

(*c*) 1 Ves. J. 154. The costs of such settlement may be allowed out of the ward's property, if the husband were not guilty of any aggravated misconduct, and have no property. *Anonymous*, 4 Russ. R. 473.

(*d*) 8 Ves. 74.

(*e*) *Id.* 386.

(*f*) 1 Bla. C. 462, note 8; *Id.* note 11; 2 P. Wms. 561.

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II. RELATIVE,
&c.3. Guardian
and ward.

clope; (g) and, in the case of a ward in Chancery, the court retains jurisdiction after the ward comes of age as long as property remains in court; (h) and when two guardians of an infant have been appointed by the court and one dies, the guardianship does not survive, but fresh guardians must be appointed. (i)

When the personal property of infants is very small, as pensions of 15*l.* per annum each, the Court of Chancery will, upon affidavit that the children are living with their aunt, and on her petition, appoint her to be guardian, with liberty to receive the pensions, without incurring the expense of a reference to the Master. (k)

4. Master and
apprentice.

With respect to the rights and liabilities between *master and apprentice*, and their injuries and remedies, this relation should be constituted by deed, and with more care and explicit stipulation than are usually adopted, and in such deed an adult party should covenant for the good conduct of the apprentice, who, being himself usually under age, could not be sued for his misconduct. (l) Unless the relation of master and apprentice be duly constituted, there are cases in which the former cannot sue for the abduction of the latter; (m) though in general a third person cannot protect himself from liability to an action for seducing away or detaining an apprentice or servant *per quod*, &c. by setting up any formal objection to the contract of apprenticeship or hiring whilst the service under it was continuing, (n) and the apprentice himself is liable to be punished for running away, although the indenture be voidable, as he ought to have first avoided them by a reasonable notice. (o) The master has such an interest in his apprentice, that he may defend him with force, (p) and he may maintain an action for the battery, debauching, or injury of his apprentice, if any loss of service ensue; (q) so if the apprentice be harboured after request, he may retake him or support an action for the detention, (r) or he may sue the third person who covenanted for his services. (s) But a master cannot at his own instance have an *habeas corpus* for his apprentice who has been impressed, (t) for the statutes only authorize that writ at the instance of the *party imprisoned*. (u) When, however, an apprentice has been impressed, the Chief

(g) 1 Car. & P. 101.

(h) *Austen v. Halsey*, 2 Sim. & Stu. 123.(i) *Bradshaw v. Bradshaw*, 1 Russ. R. 528.(k) *Ex parte Jones*, 1 Russ. R. 478.; and see *ante*, 68, 69, and 4 Russ. 307, 308.(l) *Cro. Car.* 179; *Dougl.* 518; 3 B. & Ald. 59; 6 B. & C. 686.

(m) 4 Taunt. 876.

(n) 2 Hen. Bla. 511; 7 T. R. 310;

1 Anstr. 256.

(o) 6 T. R. 652; *Cald.* 26; 3 M. & S. 189.

(p) 2 Rol. Ab. 546.

(q) 6 T. R. 652.

(r) *Id.*; 7 T. R. 310, 314.(s) *Dougl.* 518.

(t) 6 T. R. 497; 7 T. R. 545; 5 East, 38.

(u) *Id. ibid.*; 31 Car. 2, c. 2; 56 G. 3, c. 100.

Justice has power to issue his warrant on the application of the master, especially when no access can be had to the apprentice himself. (*v*)

CHAP. II.
II. RELATIVE,
&c.

4. Master and
apprentice.

If an apprentice be disobedient, he may be moderately *corrected* by the master himself, (*w*) but not by any delegated party; (*x*) and the master is entitled to all the apprentice's earnings, however considerable, in case he should wrongfully absent himself. (*y*)

As one of the objects of apprenticeship is correction and amelioration of morals, as well as continued instruction, the absence or other misconduct of an apprentice is no adequate ground for the master wholly discharging him, and upon the apprentice's return the master's covenant to instruct continues in full force till the end of the term, unless specially provided otherwise; (*z*) and which provision should be introduced. (*a*) But in case of robbery by an apprentice, or any continued gross misconduct, magistrates will, on the application of the master, usually discharge him from continuing liability. (*b*)

On the other hand, an apprentice has rights and duties. He may defend his master with force. (*c*) If his master withhold maintenance a magistrate will enforce it; (*d*) magistrates at sessions may also enforce proper instruction; (*e*) and disputes between them may be settled, with the consent of the master, either by a single magistrate or at sessions; (*f*) and magistrates and a Court of Equity will, in some cases, enforce a return of premium or a just proportion. (*g*) If a master, by cruelty or starvation, cause the death or endanger the life of his appren-

(*v*) *Ante*, 70, note (*t*), and *post*.

(*w*) 1 Bar. & C. 469; Cro. Car. 179; 2 Show. 289; *ante*, 64, as to the correction of a child.

(*x*) 9 Coke, 76.

(*y*) 1 Taunt. 112; 3 M. & S. 1; 4 Taunt. 870; 1 Bla. C. 453.

(*z*) *Winstm v. Lewin*, 1 Bar. & Cres. 460; 2 Dowl. & R. 465.

(*a*) A clause might be inserted as follows, "Provided always nevertheless, and it is hereby covenanted and agreed by and between the said parties, that in case the said apprentice shall at any time or times hereafter be wilfully guilty of disobedience or misconduct towards his said master, or any of his family or servants, and his said master shall give notice thereof in writing to the said E. F. (the person bound for the apprentice) then if the said apprentice shall, after the said E. F. shall have received such notice at least twenty-four hours, again be wilfully guilty of the like, or any other misconduct towards his said master, or any of his family or ser-

vants, then it shall be lawful for his said master immediately wholly to discharge such apprentice from his said service, and it shall or may be lawful for him, thenceforth, during the residue of the said term, wholly to refuse to maintain, instruct, or receive his said apprentice, and shall not be required to return any part of the said premium."

(*b*) See *Burn's J. Apprentice*.

(*c*) 2 Rol. Ab. 546.

(*d*) 20 Geo. 2, c. 19; 4 Geo. 4, c. 29.

(*e*) *Burn's J. Apprentice*, VI.

(*f*) *Burn's J. Apprentice*.

(*g*) *Id. ibid.*; Chit. Eq. Dig. 74. In a late case, *Peake v. Sheppard*, in the Mayor's Court, London, 31 May, 1831, after citing "*Bolton's Privilegia Londini*," to show that a master has a right to turn away an apprentice who has been guilty of theft, the court decided, upon a bill filed for restitution of a premium of 20*l*. to the father of the apprentice, that only 5*l*. should be returned.

CHAP. II.
II. RELATIVE,
&c.

4. Master and
apprentice.

tice, he may be indicted; but as there is no obligation on a married woman to provide food for an apprentice, a wife, though *foro conscientiae*, perhaps, equally guilty, would not be punishable for merely withholding requisite food. (k)

5. Relation of
master and ser-
vant, clerks, &c.

The relations of *master and servant*, and *master and clerk*, materially differ from each other, and require distinct consideration. With respect to *servants*, they are of various descriptions. *First*, servants in *husbandry* and labourers: *secondly*, those in particular *trades*; and *thirdly*, *menial* servants. The two former are by particular statutes placed under certain salutary regulations, but unfortunately as yet magistrates have no controul over menial or domestic servants, (i) though a description of persons to whom some summary remedies and punishments might be well applied. There is one general law, however, applicable to *all* servants, namely, that if hired for a year, and if they have duly served during that time, they acquire a *settlement* in the parish in which the last forty days' service and sleeping took place; (k) and, therefore, in order to prevent a charge upon a parish in which a master resides, it has become a practice, legalized by decisions, (l) purposely to hire servants for less than a year; and sometimes leases expressly stipulate that tenants shall so hire, on purpose to avoid burthening the parish with fresh paupers.

1. Servants in
husbandry.

Under controul
of magistrates,
when.

Servants, *labourers*, and workmen in *husbandry*, are placed by several statutes under the controul of magistrates, who have power to regulate their hours of work and amount of wages, and of compelling the payment, and requiring the payment in money and not in goods, and prescribing punishment for misconduct of such servants. (m) The 20 Geo. 2, c. 19, has been considered to extend to every description of *labourer*, (n) yet none of the acts extend to *menial* or *domestic* servants, (o) and those affording magistrates jurisdiction to decide upon the subject of wages seem only to extend to those *labourers* with reference to whom the justices had power to make a rate of wages; (p) nor do they extend to any case where work is done under a contract for a certain sum, or when the hours of work are entirely in the discretion of the contracting party. (q) In

(k) *Rex v. Ridley*, 2 Campb. 650; *Rex v. Friend & wife*, Russ. & Ry. C. C. 20, and see *Rex v. Squire & wife*, 1 Russ. 16.

(i) *Rex v. Brampton*, Cald. 11; *The King v. Hullcott*, 6 T. R. 585; 8 East, 113.

(k) See Burn's J. tit. Poor, 318 to 423, 819.

(l) *Rea v. Houghton*, Foley, 137; 1 Stra. 83; Burn's J. Poor, V. ninth sub-

division.

(m) See Burn's J. tit. Servants.

(n) *Lowther v. East Radnor*, 8 East, 113.

(o) *The King v. Hullcott*, 6 T. R. 583.

(p) *Bramwell v. Penneck*, 7 Bar. & Cres. 556.

(q) *Lancaster v. Greaves*, 9 B. & C. 628; *Hardy v. Ryle*, Id. 603.

cases of that nature magistrates cannot legally interfere, and any balance of wages must be recovered by action. Thus the acts do not extend to a person being employed by an attorney to keep possession of goods seized under a *fieri facias*,^(r) nor to a person who has entered into a written contract to do certain work on a road within a certain time, for a certain sum, he not being working for wages.^(s)

In cases within the act 4 Geo. 4, c. 34, a magistrate cannot both commit for punishment *and also* discharge the servant, as he is only authorized to discharge from service *in lieu* of punishment.^(t) Servants in husbandry are very generally hired by the year, as from Michaelmas to Michaelmas, and this is an entire hiring for a year;^(u) and, unless otherwise stipulated, no wages are payable until the end of the year.^(x)

A master cannot, by way of correction, even moderately beat his *servant*, or labourer in husbandry, or otherwise, as he might his child or apprentice; and if he do, the servant may lawfully depart, or obtain his discharge, by application to a justice,^(y) and support an action for the battery. There is, however, an exception as to two descriptions of servants, *viz.* sailors^(z) and soldiers,^(a) allowed from the necessity of larger powers to preserve discipline and prevent mutiny. If a *sailor* be guilty of disobedience or disorderly conduct, the captain of a king's ship, or master of a commercial vessel employed in commerce or trade, may lawfully correct him in a reasonable manner. It is said, though incorrectly, that his authority in this respect is analogous to that of a parent over his child, or a master over his apprentice or scholar.^(b) A master, on his return to this country, may be called upon by action to answer to a mariner, who has been beaten or imprisoned by him during a voyage; and, for the justification of his conduct, he should be able to show not only that there was a sufficient cause for chastisement, but also that the chastisement itself was reasonable, for otherwise the mariner may recover damages propor-

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(r) *Bramwell v. Penneck*, 7 Bar. & C. 536.

(s) *Lancaster v. Greaves*, 9 B. & C. 628.

(t) *Lancaster v. Greaves*, Chit. Col. Stat. 874, *et supra*.

(u) 2 Stark. R. 257; F. N. B. 168.

(x) 1 Bla. Com. 425; *Rex v. Whittlebury*, 6 T. R. 467, per Lawrence, J.

(y) 1 Bla. Com. 428; F. N. B. 168; 1 Bar. & Cres. 469.

(z) *Abbott on Shipping*, 160.

(a) *Bul. Ni. Pri.* 19; 2 Car. & P. 148.

(b) *Abbott on Shipping*, 160, cites Ca-

saregis Disc. 136, n. 14, cited by Valin on the French Ordinance, tom. 1, 449. See also Ordinances of Phil. 2, A.D. 1563; 2 Mag. 19; Molloy, book 2, c. 3, s. 12; and the case of *Watson v. Christie*, 2 Bos. & P. 224. But there is no such analogy, the implied authority of a parent or master of an apprentice to correct is merely for the moral improvement of the child, or apprentice, that of a master of a ship is merely to secure subordination and prevent mutiny, and not with reference to any improvement of the sailor.

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5. Master and
servant.

2. Servants in
trades.

tionate to the injury received. (c) And if the master strike a mariner without cause, or use a deadly weapon as an instrument of correction, where moderate correction might legally have been inflicted, and death ensue, he will be guilty at least of manslaughter. (d) The same principles apply to soldiers, who, however, are generally punished under sentence of a Court-Martial.

Servants and workmen in *particular trades* are also subject to the controul of the magistrate, under several acts, some of them confined to particular trades, as the silk, cloth, woollen, linen, fustian, cotton, iron, leather, hat, lace, clock, paper, tailor, shoemaker, and other trades; (e) and disputes between master and servants in husbandry, artificers, calico printers, handicraftsmen, miners, colliers, keelmen, pitmen, and glassblowers, and *other labourers* in general, are regulated by several more general acts. (f)

The 5 Geo. 4, c. 96, relates to *arbitrations* between master and workmen, and entitles either the master or workmen to *demand* an arbitration in certain cases; and in that case appears to be compulsory, and precludes the other party from suing. (g) The same act, and the 6 Geo. 4, c. 129, prohibit and provide punishment for combination amongst masters or workmen, and against persons for compelling journeymen to leave employment, or to return work unfinished, or to prevent them from hiring themselves, or compelling them to belong to clubs, or to pay fines, or to alter the mode of carrying on business. The 9 Geo. 4, c. 31, s. 25, makes assaults, in pursuance of any conspiracy to raise wages, punishable as a misdemeanor, with imprisonment not exceeding two years, &c.; and an assault on a seaman, keelman, or caster, to prevent them from working, subjects the offender to imprisonment for three calendar months. (h)

3. Menial or domestic
servants.

With respect to *menial* or *domestic* servants, the terms of

(c) To an action of this sort, the master must plead specially that the plaintiff committed such a particular fault, and that he corrected him moderately for it. The plaintiff, by his replication, may either deny the cause of correction, or, admitting the cause, may insist that the correction was excessive. If the master do not plead his justification specially, he will not be entitled to give in evidence under the general issue, for the purpose of mitigating damages, facts which if pleaded would have amounted to a justification. *Watson v. Christie*, 2 Bos. & P. 224.

(d) *Captain Kidd's case*, 5 State Tr. 287.

(e) *Burn's J. Servants*, 370 to 410.

(f) 20 Geo. 2, c. 19; 17 Geo. 2, c. 16; 31 Geo. 2, c. 11; 6 Geo. 3, c. 25; 57 Geo. 3, c. 122; 58 Geo. 3, c. 5; 4 Geo. 4, c. 34; 10 Geo. 4, c. 52.

(g) *Crisp v. Banbury*, 8 Bing. 394, appears applicable in principle.

(h) 9 Geo. 4, c. 31, s. 26. It has recently been well suggested, that it would be highly salutary to pass an act to prevent masters from paying their servants and labourers at a usual *pay-table at a public house*, thereby inducing the publican to give too much credit during the week, and the men to get intoxicated when paid off, instead of taking home their money for the benefit of their families.

hiring are either express or implied. It would be expedient, to prevent disputes, to reduce the terms into writing, and the agreement need not be stamped. (i) If no terms be stipulated, it is considered a hiring, with reference to the general understanding upon the subject, that is, a continuing service, until the expiration of a month's warning given by either party, (k) or, as it has been said, until the master pay a month's wages in advance ; (l) and, unless so expressly stipulated, the servant has no right to take away livery or other clothes supplied by his master, although he be wrongfully turned away. (m)

A master has no right to correct a menial or domestic servant, otherwise than by words and remonstrance ; and if he beat him, though moderately, by way of correction, it is good ground for the servant's departure, and he might support an action against the master. (n)

The rights of a master to *discharge* a servant in husbandry before the expiration of the time for which he was hired, and that of the master of a *domestic* servant to discharge him immediately for misconduct, appear to be governed by the same principle, and the cases may therefore be considered together. With regard to servants in husbandry, it has been considered that a master is justified in immediately dismissing him, if he disobey his orders or be guilty of other misconduct, without first going before a justice of the peace. (o) As where the master, just before the servant's usual hour of dinner, ordered him to take his horses to a small distance before he dined, and the servant refused, and afterwards did not submit, it was held that the master was justified in immediately discharging such servant, and that he could not recover any proportion of his wages. (p) So if any single female yearly servant at any time

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servant.

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illegal.

What misconduct authorizes
a master immediately to discharge a domestic menial servant.

(i) See express exemption, 55 Geo. 3, c. 184, schedule Agreement.

(k) *Cutter v. Powell*, 6 T. R. 326 ; *Robinson v. Hendman*, 3 Esp. R. 235 ; 2 Selw. N. P. 1032, S. C.

(l) *Robinson v. Hendman*, 3 Esp. R. 235, and admitted by Ld. Kenyon ; S. C. 2 Selw. N. P. 1032, *sed quare*, whether any such contract can be implied. If a servant conduct himself properly, he ought to have reasonable notice to quit ; and a month's wages would be but an inadequate compensation for the loss of intermediate board and lodging.

(m) 3 Car. & P. 470 ; and see *Id.* 349.

(n) 1 Bar. & Cres. 469 ; F. N. B. 168 ; 1 Bla. C. 428.

(o) *Spain v. Arnott*, 2 Stark. R. 256 ; *Rex v. Bampton*, Cald. 11.

(p) *Spain v. Arnott*, 2 Stark. R. 256 ; 5 Burn's J. 361. Assumpsit to recover wages for service from Michaelmas to July. The plaintiff was a yearly servant to the defendant, who was a farmer. The plaintiff usually breakfasted at five o'clock in the morning, and dined at two. One day the master ordered the servant to go with the horses to the marsh, which was a mile off, before dinner, dinner being then ready. The plaintiff said that he had done his due, and would not go till he had had his dinner. The defendant told him to go about his business ; and the plaintiff went accordingly, without offering any submission, or to obey his master's orders.

After argument of counsel, Lord Ellenborough, C. J. said, " If the contract be for a year's service, the year must be com-

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servant.

during the year appear with child, the master may turn her away. (q) So if a servant repeatedly sleep out at night without leave. (r) And it has been decided in the House of Lords

pleted before the servant is entitled to be paid. If the plaintiff persisted in refusing to obey his master's orders, I think he was warranted in turning him away. He (the master) might have obtained relief by applying to a magistrate, but he was not bound to pursue that course; the relation between master and servant, and the laws by which that relation is regulated, existed long before the statute cited. There is no contract between the parties, except that which the law makes for them, and it may be hard upon the servant; but it would be exceedingly inconvenient if the servant were to be permitted to set himself up to controul his master in his domestic regulations, such as the time of dinner. After a refusal on the part of the servant to perform his work, the master is not bound to keep him on as a burdensome and useless servant to the end of the year. In the present instance, it might be very inconvenient for the master to change the hour of dinner: the question really comes to this, 'whether the master or the servant is to have the superior authority?' A juror was afterwards withdrawn by consent.

Being absent when wanted; sleeping from home at night without his master's leave, &c. is sufficient cause for dismissal; and the servant will only be entitled to such wages as are due at the time of his discharge; *Robinson v. Hindman*, 3 Esp. R. 235.

Where a clerk and traveller, hired by the year, assaulted his employer's maid-servant, with intent to take liberties with her against her consent, it was held to be a good cause of immediate dismissal; *Atkin v. Acton*, 4 Car. & P. 208; and it seems also from that case, that a servant dismissed for such or the like cause, is not entitled to proportionate wages, even for the time he has actually served. *Id.*

(q) *Rex v. Brampton*, Cald. 11, 14; 5 Burn's J. 361, 362, note (a). In the case of *Rex v. Brampton*, Cald. 11, the principal question was, whether a maid-servant hired for a year could be discharged by her master three weeks before the end of the year, (she being with child), by his own authority, without the intervention of a magistrate, so as to prevent her gaining a settlement? By Lord Mansfield, C.J. "The question is, has the master done right or wrong in discharging the servant for this cause? I think he has done no wrong. Shall the master be bound to keep her in his house? To do so would be *contra bonos mores*; and in a family, where there are young persons, both scandalous and dangerous." Willes, J. said, that

"this case differs from those of *Rea v. Richmond*, Burr. S. C. 740, and *Rex v. Islip*, 1 Stra. 428, where the cause of the discharge of the servant by the master was not reasonable. Here, if the master had daughters, it would not be fit that he should keep such a servant, though I think he could not avail himself of the authority of a magistrate, the jurisdiction of justices being confined to cases in husbandry."

Upon this case, it has been observed by Mr. Caldecott, that all that seems established by this case, is, that a master may, without the intervention of a magistrate, dismiss his servant for *moral turpitude*, even though it be not such for which the servant may be prosecuted at common law. Whether he may or may not, for any other species of misconduct or general misbehaviour, though there are authorities to show that he cannot, seems, from this case, not to be fully and absolutely settled. By the general practice throughout the kingdom, and particularly in large towns, this power, however warranted, is exercised by masters; certainly, this question has not of late years been brought before the court for argument, except in the case of *Burrow v. Sayer*, T. R. 27 G. 2. But at the sittings at Westminster, 1773, it arose before Lord Mansfield. A wet-nurse, retained for the year, was discharged by her mistress, who tendered her in proportion to the time she had served: this was refused, and the action brought for the whole year. It was proved on behalf of the defendant, that the plaintiff had been frequently *insolent* to her mistress, the defendant's wife, and was subject to violent fits of *passion*, in which she had several times frightened, and once awakened her mistress, while sleeping, before her recovery. It was also proved, that these *fits of passion* must be injurious to her milk: and it was insisted, that all these circumstances amounted to reasonable cause, and even created a necessity of discharging the plaintiff. But per Lord Mansfield: "No person can be judge in his own cause, and this first principle could never be meant to be overturned by any law or usage whatsoever." And though it was stated as the general usage or practice in London, Westminster, and the environs, to dismiss servants with a month's wages, it was disregarded by the court, and the servant had a verdict for the whole year; *Temple v. Prescott*." But see the cases in the prior notes, which appear to contradict the doctrines advanced by Lord Mansfield.

(r) *Robinson v. Hindman*, 3 Esp. R. 235.

(reversing the judgment of the Court of Session in Scotland) that a mistress was entitled immediately to dismiss her principal gardener, whose service was to have continued until a subsequent time, on account of his having been absent from his service for four days without leave. (s) The general rule seems to be, that a master may dismiss even a yearly servant before the expiration of the year, if guilty of moral misconduct, pecuniary or otherwise, or wilful disobedience or habitual negligence. (t) A gamekeeper or bailiff guilty of misconduct, may be discharged without previous warning, and he cannot afterwards legally retain possession of a house incident to his service. (u) Other applicable cases, in which a master might discharge a servant, will be found collected, when we presently consider the misconduct for which a *clerk* may be discharged. (x)

But the misconduct of the servant, to entitle a master immediately to discharge him, must be actual disobedience, or such improper conduct as affects the due controul over his domestic establishment, and therefore *previous* immorality, as having had an illegitimate child antecedent to the commencement of the service, would be no adequate ground of discharge, (y) though his debauching his female servant *during* the service would be otherwise. And the discharge of the servant on account of misconduct should be *immediate* or on repetition, for otherwise the master is to be considered as having waived the right to an immediate discharge, and could not by after-thought assign the antecedent imputation as an excuse for suddenly turning him away, without fresh cause. (z)

A servant marrying is no ground of discharge, and he must serve out the time; (a) nor is *sickness* an adequate reason for turning away a servant before the expiration of the time of service, or even for abatement of wages, (b) though the master is not legally bound to provide medicine or medical advice; (c) but if he interfere, a contract may be inferred, so as to subject him to liability to the medical attendant, and in that case the

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(s) *Crauford v. Reid*, 1 Shaw's Rep. 124.

(t) *Culto v. Brouncker*, 4 Car. & P. 518.

(u) *Moore's Rep.* 8, 9; *Littleton's Rep.* 439; 16 East, 33.

(x) *Post*.

(y) *Rex v. Westmeon*, Cald. 129.

(z) *Semble*, see *Winstone v. Linn*, 1 Bar. & C. 460, and 2 D. & R. 465, S. C.

(a) *Com. Dig. Justice, Peace*, B. b. 3; *Dalt.* c. 58.

(b) *Dalt.* c. 58; 2 H. Bla. 606; *Rex v. Winter*, Cald. 298; *Rex v. Sudbrooke*, 1 Smith's R. 59.

(c) *Wennall v. Adney*, 3 Bos. & Pul. 247; *Sellen v. Norman*, 4 C. & P. 80; *Watling v. Walters*, 1 C. & P. 132; *Newly v. Wiltshire*, 2 Esp. R. 739.

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master could not deduct the amount of his payments from the wages. (d)

Insanity of the servant would not, in strictness of law, determine the contract of hiring. (e) But it might be an adequate ground for a magistrate discharging a servant in husbandry; (f) or if the servant thereby became dangerous to go at large, proceedings might be had under the statute against lunacy, which would at least relieve the family from all present danger. (g)

In the case of a domestic servant hired in the general way, it appears to have been considered that he is entitled to his wages up to the time he actually serves, though he die or do not continue in the service the whole year, either from misconduct or otherwise, (h) but not to any wages after the time of such discharge; though in case of felony or embezzlement, or other gross misconduct by a clerk, he forfeits an arrear of unpaid salary; (i) and a master cannot, without express stipulation, deduct from the wages the value of articles broken or lost by the servant's want of care, however gross. (k) In many cases therefore it is expedient, and the practice in hiring waiters at inns and taverns is for the servant to make a deposit, or expressly to provide against such loss, for though a cross action for gross want of care would unquestionably be sustainable, (k) yet it would scarcely ever be advisable to sue a servant on such a claim.

In general, in cases of domestic servants, regular *payment* of the wages will be presumed, after a lapse of time subsequent to leaving his service, and without claim, it not being usual to allow such claims to go long unsatisfied, or to take receipt for the payment. (l)

A gamekeeper, guilty of disobedience, may be discharged forthwith without any previous notice, (m) and his residence in a house by permission of the lord of a manor, is lawful only whilst he is gamekeeper (n)

It is not legally compulsory on a master or mistress to give a discharged servant any character, and no action is sustainable for the refusal; (o) but if a character be given, it must accord

Giving characters.

(d) *Ante*, 77, n. (c.)

(e) *Rex v. Sutton*, 5 T. R. 659; *Rex v. Hullecott*, 6 T. R. 587.

(f) *Quare*, see *id.* *ibid.*

(g) 39 & 40 Geo. 3, c. 94, s. 3; 7 Bar. & C. 669.

(h) *Cutler v. Powell*, 6 T. R. 326; *Robinson v. Hindman*, 3 Esp. R. 325.

(i) *Post*.

(k) 4 Campb. 134.

(l) *Sellon v. Norman*, 4 C. & P. 80; and see 3 Campb. 10; 1 Stark. R. 136; where it was presumed that a servant to a milkman had every week paid over monies collected by him.

(m) Moore, 8.

(n) *Litt. Rep.* 139; 16 East, 33.

(o) *Carrol v. Bird*, 3 Esp. R. 201, and *Ashover v. —*, Cald. 11.

with the truth, for if a false *good* character be given, and the servant afterwards rob his new master, the person who gave such false character is liable to an action, and to compensate for the entire loss, (p) and he is liable to punishment in certain cases of false character, under the statute 32 Geo. 3, c. 56. (q) On the other hand, if a *bad* character of a servant be untruly and *maliciously* given, the party giving it will be liable to an action for defamation, (r) though until the untruth of a character and express malice have been proved, the communication is presumed to have been privileged, and no action is tenable. (s)

In general there is a reciprocal right in *every description* of master and servant to *defend* each other even with force. (t) If a servant be killed, though the master sustain a loss of service, the civil remedy is merged in the felony. (u) But if a person be strictly a servant, (and not a mere performer at a theatre, (x)) the employer may sue for his battery and consequent loss of service, or for a menace *per quod* the servant could not finish his work; so he may sue for abducting or harbouring his servant after request; (y) but after recovering against the servant of a penalty or damages for absenting himself, an action cannot also be sustained against a third person for harbouring him. (z) If several conspire to injure a person in his trade, by enticing away a servant or journeyman, they may be indicted or sued for the conspiracy; (a) an action on the case is also the common remedy for debauching a servant *per quod servitium amisit*, (b) or trespass lies if the seduction were accompanied with an illegal entry into the master's house. (c)

It is incumbent on every master in prudence, before he hires a servant or clerk, well to ascertain his character for care and good conduct, for a master is in general liable civilly, and sometimes criminally, for torts committed by his servant in the course of or under colour of his employ. Thus a baker is indictable for the sale of bread in which his servant had improperly mixed alum, (d) and for a nuisance committed by his servant, as by throwing dirt into the highway; (e) so the proprietor

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Defence of master and servant, &c.

Liability of master, &c.

(p) See 1 Bla. C. by Christian, 432, in notes, and Burn's J. Servant, XXXI. vol. 5. p. 433.

(q) Id. *ibid*.

(r) *Patteson v. Jones*, 8 Bar. & C. 578, ante, 45, 46.

(s) Id. *ibid*.; *Child v. Affleck*, 9 Bar. & C. 403; 4 Burr. 2425.

(t) *Tiskeet v. Read*, Loft's R. 215; 2 Rol. Ab. 546, D. pl. 2; Owen, 151.

(u) *Styles*, 347; *sed quære* as to com-

penation for the temporary loss of service, 1 Campb. 193.

(x) 1 Esp. R. 386.

(y) 1 Salk. 380; F. N. B. 167; 6 T. R. 221; 2 Bar. & C. 448.

(z) 3 Burr. 1345.

(a) 2 Stark. R. 489.

(b) 5 East, 45; 6 East, 391; 11 East, 23

(c) 2 T. R. 166.

(d) 3 M. & S. 11.

(e) 1 Ld. Raym. 264.

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clerks.

of a newspaper is liable, criminally as well as civilly, for the publication of a libel, though he has nothing to do with the publication, and the whole is conducted by his servants. (*f*)

But a master is not liable for the *wilful* misfeasance of his servant, losing sight of his master's employ, as for *wilfully* driving his master's carriage against that of another, (*g*) though if the same act had been done negligently or merely injudiciously, the master would have been liable; (*h*) and where a person, only occasionally employed by the defendant as his servant, having been sent by him on his business, took the horse of another person, in whose service he also worked, and in going, rode over the plaintiff, it was left to the jury whether he acted under implied authority of the defendant, and they having found in the affirmative, the court refused to grant a new trial. (*i*) But where a postchaise is hired, the postmaster, and not the hirer, is in general liable for any damage. (*k*)

Clerks are only a superior description of *servants*, whose duties are limited to the particular trade or employment to serve in which they are hired. In hiring these, it is particularly expedient to specify the terms in an express written contract, and to add, "that in all respects not particularly specified, the clerk shall perform the like duties, and observe the same conduct as all faithful and well conducted clerks in a similar station ought to observe." It has been held that a clerk of this nature, hired generally at specified yearly wages, is to be considered as hired for an entire year, and that the service cannot be put an end to before the end of an entire year, unless upon some adequate ground of misconduct on the part of either party. (*l*) The doctrine of a month's wages or a month's warning does not apply to a clerk. (*m*) In case the service should continue beyond a year, yet the intendment would be in favour of another year's service; but it is not settled that with analogy to tenancies of real property, half a year's or three months', or any specific notice of the determination of the service at the end of a year, is necessary, (*n*) probably a quarter's notice would be held sufficient; and in a late case, it seems to have been considered, that

(*f*) *Rex v. Walter*, 3 Esp. R. 21; *Rex v. Alexander*, M. & M. C. C.

(*g*) *M'Ans v. Cricket*, 1 East, 106.

(*h*) *Croft v. Alison*, 4 B. & Ald. 590; and *Bowcher v. Moidstram*, 1 Taunt. 568.

(*i*) *Goodmen v. Kenwell*, 1 M. & P. 241; 3 Car. & P. 167, S. C.

(*k*) *Smith v. Lawrence*, 2 M. & R. 1; and see 5 B. & C. 547.

(*l*) *Beeston v. Collyer*, 4 Bing. 389; 2 Car. & P. 607, S. C.; *Huttman v. Bullnois*, 2 Car. & P. 510; *Atkin v. Acton*, cor. Lord Tenterden, at Westminster, 16th April, 1830, 4 Car. & P. 208.

(*m*) *Id. ibid.*

(*n*) 4 Bing. 409; 12 Moore, 552; 2 Car. & P. 607.

if a clerk be engaged at a salary of 100*l.* a year, and having received his wages up to a certain time, and served some time longer, and then leave the service before the year expires, without due cause, and without any notice, he was not entitled to recover any wages up to the time of his quitting, and, at all events, was liable to a cross action for leaving the service without notice; (*o*) and on the other hand, if a clerk or person be expressly hired for a year or time certain, and be improperly dismissed before the end of the term, he may, on showing his readiness to complete the service, recover wages for the full time of his hiring, sometimes on general pleadings, and always under special pleadings properly adapted to the case, and showing the contract and the improper discharge. (*p*)

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clerk.

There is always an implied duty on the part of a steward, clerk, or other person employed to receive and pay money for a principal, to keep and to render just and explicit accounts, and produce vouchers; and though after a dispute has arisen between a person and his steward, a gross sum has been, upon the interference of a clergyman, paid to the latter in lieu of all claims, without vouchers being rendered, the principal has a right to, and may compel the steward to render his accounts and produce vouchers. (*q*)

With respect to the right of a master *suddenly to discharge* his clerk, the cases in which the dismissal of a domestic servant may be justified, will in general apply; (*r*) where a clerk and traveller hired by the year assaulted his maid-servant with intent to take liberties with her against her consent, it was held an adequate ground for his immediate dismissal; (*s*) and it should seem also from the same case, that a servant dismissed for such or the like cause is not entitled to proportionable wages even for the time he had actually served. (*t*) So where in an action by a shopman for four quarters' wages, it was proved that the defendant was a silversmith, and that the plaintiff had stolen silver spoons, and embezzled some money when received in the trade, Lord Tenterden ruled, that a servant thus habitually embezzling his master's property, the amount was imma-

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clerks.

(*o*) *Huttman v. Bullnois*, 2 Car. & P. 510.

(*p*) *Gandall v. Pontingin*, 4 Campb. 375; 1 Stark. R. 198, S. C.; *Archard v. Homer*, 3 Car. & P. 349; and see the Pleadings, and 2 Chit. Pl. 5 ed. 324 to

330; and *Id.* 65, 74, 259; 2 East's R. 145.

(*q*) *Jenkins v. Gould*, 3 Russ. R. 385; and *post.*

(*r*) *Ante*, 75.

(*s*) *Atkin v. Acton*, 4 Car. & P. 208.

(*t*) *Id.* *ibid.*

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H. RELATIVE,
&c.

5. Master and
clerk.

Offences of
clerks.

Liability of a
surety for a
clerk.

terial, and though the arrear of wages might exceed the value, he could not recover any part. (u)

A clerk or servant in *trade* may legally, pending his service, solicit business from his master's customers for himself when his service shall be at an end, and he has set up on his own account; (x) and, therefore, if any loss is to be apprehended from such an attempt, it should be specially prohibited, and limited to a certain distance from the place of employment, so as not to constitute too general a restraint of trade. (y)

There are special provisions against *larceny* and *embezzlement* by clerks and servants, and which constitute felonies; (z) the provisions against embezzlement only apply to a clerk or servant, who by virtue of his *ordinary employment* receives any chattel, money, or valuable security for, or in the name of, or on the account of his master; the enactments therefore do not extend to a person who is only employed on a particular occasion; (a) and it is expressly provided that the enactments shall not prejudice any civil remedy at law or in equity; (b) consequently, the remedy by action against the clerk or against a surety on any bond taken for his faithful accounting still continues.

If a bond or covenant be taken from a *surety* for the faithful conduct of a clerk, it should be so framed as to continue to operate, notwithstanding any change in the firm or partners by death or other event, for otherwise it would cease to operate on the retiring or addition of a partner. (c) But it would be otherwise if properly framed, so as to continue to operate after a change of persons. (d) And on the behalf of the surety it should be expressly provided, that he shall be at liberty to withdraw his guarantee, upon giving a certain reasonable *notice*, for otherwise he might continue liable, notwithstanding notice of his desire to determine his liability, and notwithstanding the creditor took a new security, and the original hiring was only as long as the employer and the clerk should think fit. (e) It would be prudent also to stipulate that the obligee or master

(u) *Brown v. Croft*, 3d March, 1828, cor. Lord Tenetorden; Gurney for plaintiff; Scarlett for defendant, MS.

(x) *Nichol v. Martyn*, 2 Esp. R. 752.

(y) *Young v. Timmins*, 1 Croup. & Jer. 331.

(z) 7 & 8 Geo. 4, c. 29, s. 46 to 48.

(a) *Rex v. Prince*, Mood. & M. 21; 2 Car. & P. 517.

(b) 7 & 8 Geo. 4, c. 29, s. 52.

(c) *Weston v. Barton*, 4 Taunt. 673; 8 Moore, 588; *Pemberton v. Oakes*, 4 Russ. 154, 167.

(d) *Id. ibid.*; *Metcalf v. Bruin*, 12 East, 400.

(e) *Calvert v. Gordon*, 3 Man. & Ry. 124; 7 Bar. & Cres. 809, S. C.; 2 Simons' Rep. 253, S. C.; and the same doctrine was entertained in equity, *sed quare*.

shall, at stated periods, ascertain and communicate to the surety the state of the clerk's account, for otherwise it will happen that the master confiding in the surety will let the clerk proceed in his irregularities to a ruinous extent, and then sue the surety for the whole defalcation; (*f*) and unless it be expressly so stipulated, delay in examining the clerk's accounts, or any conduct short of stipulated indulgence, will not release a surety from liability, even in equity. (*g*) There are other precautions to be taken by all sureties, which extend also to the case of a surety for a clerk, (*h*) and will be noticed in the next chapter.

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II. RELATIVE,
&c.

5. Master and
clerk.

(*f*) *Trent N. Company v. Harley*, 10 East, 34; *Orme v. Young*, Holt's C. N. P. 34.

(*g*) *Id. ibid.*; 5 Bar. & Ald. 137.

(*h*) *Post*, c. iii.

CHAP. III.
I. RIGHTS TO
PERSONALTY.

CHAPTER III.

RIGHTS TO PERSONALTY, INJURIES, AND REMEDIES IN GENERAL.

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Division of the
subject.

WE will consider Personal Property, *first*, with respect to the *Right* therein; and *secondly* and *thirdly*, the *Injuries, Offences, Remedies*, and Punishments.

I. THE RIGHTS
TO
PERSONALTY.

RIGHTS to Personalty are to be considered, *first*, with respect to the *nature of the thing*; *secondly*, the *extent of interest* therein; *thirdly*, the time of actual enjoyment; *fourthly*, the *number of the owners*; *fifthly*, the several *modes* by which a *right* to tangible personal property may be *acquired*; and *sixthly*, *contracts*, or how a right to choses in action may be acquired.

First. The nature
of Personalty,
and several
kinds.

Personalty is principally distinguished from Realty by its actual or supposed *mobility*, and the want of that *durability* which accompanies *all real* property and *all permanent* rights issuing out of it, and which are therefore considered to be and are in their nature as permanent as the land itself. (a) It is principally on account of the absence of those properties of real property that the owner of personalty is *not* entitled to many privileges, such as voting at elections for members of parliament, (except in right of certain leaseholds,) nor is he qualified for certain stations in life; and personal property is distinguished from realty by its liability to seizure and absolute sale of the entire interest to satisfy the debt of the

Incidents dis-
tinguishing per-
sonalty from
realty.

(a) *Leases for years* and tenancies at will or at sufferance have not such durability, and are therefore *personalty*. That

leases, though for a term perpetually renewable, are not an interest in *real* estate, see *Waldron v. Howell*, 3 Russ. R. 376.

owner, when only a part of the annual value of real property can be taken; and in respect of its being absolutely forfeited upon attainder of felony; when real property is only forfeited during life; and by the circumstance of its not in general being rateable to the relief of the poor; (b) and by the modes of acquiring and transferring it without deed, which is essential even at common law to the transfer of any permanent or freehold interest in real estate, or any easement relating thereto; (c) and by its passing, upon the death of the owner, to his executor or administrator for the benefit of creditors or legatees, or the next of kin, and not to the heir. There are, however, cases in which some kinds of personal property in some respects resemble realty, and partake of its incidents, and *vice versa*. Thus an *heir-loom* and *title deeds* relating to an estate in the hands of the owner for the time being, are in some respects in the nature of personalty, and regarded as moveables, and recoverable in an action of detinue; but they descend to the heir with the real estate; whilst a lease for years of land, although for a 1000 years, yet, as creating only a temporary interest in the realty, and being liable to forfeiture and sale under an execution and other contingencies, is mere personal assets in the hands of an executor, on account of its want of that durability in point of time which is supposed to exist in the case of a freehold interest, though merely for the life of another. (d) These and other peculiarities are essential to be kept in view, and will be more fully noticed as we proceed.

Personal things are principally of two descriptions: *first*, such as are tangible, and actually separated from real property, or readily so, and therefore in legal consideration supposed to be *moveables*, and are or may be in the actual visible possession of the owner; or *secondly*, such things as are considered *choses in action*, where the owner has not the actual occupation or possession of the thing, whether money or other specific chattel, but *must* resort to *an action* to enforce actual possession.

Another important rule generally prevails, particularly in the construction of *criminal statutes*, namely, that when a ship or other article is named, it imports a thing perfect and complete, (e) unless, as sometimes is the case, the statute expressly declare that the provision shall extend to an unfinished article, as in

(b) Burn's J., Poor, 63 to 68.

(c) 5 B. & Cres. 221.

(d) 3 Russ. R. 376, ante, 84, n. (a).

(e) In larceny of a bill of exchange, it must have been a *valid instrument*, or it will not answer the description, *Rea v. Pugh*,

2 Leach, 887; *Rea v. Yates*, Ry. & Mood. 170; 2 Stark. R. 67. If only the *half* of a bank note be stolen, it should be described accordingly, *Rex v. Mead*, 4 Car. & P. 535.

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the case of maliciously setting fire to or damaging a ship, *whether the same be complete or in an unfinished state.* (f) In criminal proceedings more strictness is required in the description of the chattel. It is said that if an animal be dead, it must be so described in the indictment. (g) But if the animal have the same appellation, whether it be alive or dead, and it make no difference as to the charge or in the punishment, whether it were alive or dead, it may be called when dead by the appellation applicable to it when alive. (h) But if the charge or punishment would be varied, then, if dead, the animal should be so described; and describing it generally would mean that it was alive. (i) If a defendant were indicted for stealing a sheep, and it should appear in evidence to have been a lamb, the prisoner must be acquitted; so if a cow were described as a heifer; (k) and mixed corn must be described accordingly, and not as one bushel of one and one of another. (l)

There cannot be strictly an *appendant* or *appurtenant* to a personal chattel, whether in possession or action, for it is only fixed and permanent property that can have such an incident; (m) but nevertheless there are instances in which certain things, besides those particularly enumerated in a deed or writing, and even in pleading, will pass and be included under that term; as in the case of the sale of a ship certain things besides masts and rigging, which, though moveables, are yet usually affixed, but also even boats, and a new rudder, and cordage, purchased for the ship, though not affixed, will pass. (n) But "farming utensils" will not pass as appurtenances in a bequest of a leasehold farm. (o)

I. Tangible Personal Property in possession.

1. *Tangible personalty in possession* includes not only things actually separated and moveable, whether animate or inanimate, but also some things which, though annexed to or proceeding out of real property, are considered by law, for some purposes and under some circumstances, *removeable*, and consequently to be treated as personalty; such are what are termed *tenant's fixtures*, removeable during his term, and *growing trees*, when sold, though not actually severed, and *emblements*, whether

(f) 7 & 8 Geo. 4, c. 30, s. 9 & 10.

(g) Russ. & Ry. C. C. 497; R. & M. C. C. 109.

(h) *Rex v. Puckering*, R. & M. C. C. 242.

(i) R. & R. C. C. 497; R. & M. C. C. 110; 1 Car. & P. 128; 2 East's P. C. 607, 777.

(k) 4 Bla. C. 240, in notes; 2 Hale, 182; R. & M. C. C. 160; 4 Car. & P.

216; 2 East's P. C. 616; but see 3 M. & S. 552.

(l) 3 Chit. Crim. L. 947, n. MS.; *Rex v. Kettle*, per Bayley, J. at Chelmsford, 11th March, 1819.

(m) 1 Co. Lit. by Thomas, 207.

(n) 5 Bar. & Ald. 918; Morgan's Prec. Trover for a Ship.

(o) 11 Ves. 657.

growing corn, roots, or cultivated grass, and growing vegetables; such as the executor of a tenant for life or *pur auter vie*, or at will, or holding under any other tenure, *uncertain* in duration, may be entitled to remove after the expiration of his interest. (*p*)

1. With respect to *animals*, they are distinguished into such as are *domita*, and such as are *feræ naturæ*. It is laid down that in such as are of a nature tame and domestic, as horses, kine, sheep, poultry, and the like, a man may have as absolute a property as in any inanimate thing, because these continue perpetually in his occupation, and will not stray from his house or person, unless by accident or fraudulent enticement, in either of which cases the owner does not lose his property; (*q*) and that the stealing or forcible abduction of such property as this is also *felony*, for these are things of intrinsic value, serving either for the food of man, or else for the uses of husbandry. (*r*) But in animals *feræ naturæ*, a man can have no absolute property. (*s*) In order however to obtain a more precise knowledge how the law regards the property in *animals* and *birds*, it will be found frequently necessary to refer to the criminal law, and in particular to the laws against larceny and malicious injuries to property, (*t*) which in general contain regulations relating to animals, when the law recognizes them to be of any value, or that they are the subject of property, from the highest and most valuable, viz. horses, mares, geldings, colts, filleys, bulls, cows, oxen, heifers and calves, rams, ewes, sheep and lambs, (*u*) down to the most inferior animals and birds, provided the latter be *usually kept in a state of confinement*. With respect to the latter of these animals, unless when taken out of the actual possession, no valuable interest whatever is by law allowed to exist. To steal the former is a capital offence, and at common law it was also larceny to steal not only them, but also their produce, as milk, or wool. It is also larceny at common law to steal an ass, a mule, swine, goats; or any kind of poultry, whether fowls, ducks, geese, turkeys, peacocks, guinea-fowls and their chickens, and eggs, and young pigeons in the house and unable to fly, and all dead eatable animals, and fish when in a trunk or net, or pheasants or other game in a mew, and a swarm of bees whilst in the hive, or upon the tree or land of a particular individual, and not quickly pursued by the party from

1. Animals,
Birds, and Fish.

(*p*) 1 Co. Lit. by Thomas, 207.

(*q*) 2 Bla. Com. 390, cites 2 Mod. 319.

(*r*) Id. ibid. cites 1 Hale, P.C. 511, 512.

(*s*) Com. Dig. Biens.

(*t*) 7 & 8 Geo. 4, c. 29, 30; and Burn's J. "Larceny;" and "Malicious Injuries," "Cattle," "Horses."

(*u*) 7 & 8 Geo. 4, c. 29, s. 25.

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whose hive they had proceeded. And it may be taken as a general rule, with respect to such description of personal property, that a civil action might be supported for *taking* the same out of, or injuring the same *whilst in* the actual possession of the qualified owner. But with regard to *wild animals or fish* when alive in a state of nature, or at large either on land or in water, and not recently escaped from the *usual place of confinement*, there is not at common law any such property as would enable any supposed owner to *indict* a party for *larceny* in taking the same; and an indictment for stealing a pheasant value 40s. of the goods and chattels of R. S. was held insufficient, for in cases of larceny of animals *feræ naturæ*, the indictment must show that they were either dead, tamed, or confined, for otherwise it will be presumed they were alive and in their original wild state of nature, and that it is not sufficient to add, of the goods and chattels of such a one, (x) though an action of trespass might be supported for taking game when dead, or when upon the land or out of the actual possession of a particular person, when he is considered the *qualified* owner; and modern acts expressly provide pecuniary penalties for taking game or fish under such circumstances. (y) *Trespass* in general lies for taking any animal or bird whatever out of the *actual possession* of a person who has secured the same; but no action lies for enticing from the premises of the owner and afterwards killing or injuring a *cat*, which is not considered of any value in law, or any *naturally wild* animal. And no *indictment* lies for stealing a *dog, cat, bear, fox, monkey, or ferret*, although taken out of the possession of the owner; (z) though whilst in actual possession, even a ferret and other animals, however inferior, would pass as part of the personal estate to the executors. (a)

As this absence of *criminal punishment* in many cases of animals (the possession of which, for purposes of sport or pleasure, become in a degree valuable to mankind,) was found to encou-

(x) *Rever v. Rough*, 2 East's P. C. 607.

(y) 7 & 8 Geo. 4, c. 29, and 1 & 2 W. 4, c. 32.

(z) 2 East's P. C. 614; *It x v. Seuring*, Russ. & Ry. C. C. 350; Burn's J. Larceny. Indictment for stealing "five live tame ferrets, confined in a certain hutch," of the price of 15s. the property of Daniel Flower. The jury found the prisoner guilty, but on the authority of 2 East's P. C. 614, where it is said that *ferrets*, amongst other things, are considered of so base a nature, that no larceny can be committed of them, the learned judge respited the judgment until the opinion of the judges could be

taken thereon. In E. T. 1818, the judges met and considered the case: they were of opinion that ferrets, though tame and saleable, could not be the subject of larceny, and that judgment ought to be arrested.

A summary jurisdiction is now given to justices of the peace by 7 & 8 G. 4, c. 29, sect. 31. And *tamed or confined ferrets* would also pass to an executor as part of the personal estate of the owner. Toller, Executors, 2 ed. 148.

(a) Toller, Executors, 2 ed. 148; Off. Exc. 58; 3 Bac. Ab. 57; 2 Bla. Com. 393.

rage small injuries in the nature of larceny, it has been recently provided, that to steal any *dog*, or any *beast or bird ordinarily kept in a state of confinement*, and not constituting the offence of larceny at common law, may be punished by *summary proceeding* before a magistrate with a conviction in 20*l.* penalty, and the punishment is to be increased on repetition of such an offence. (*b*) And the killing or taking away *pigeons* or *house-doves* when at large and under circumstances not amounting to a felonious taking at common law, subjects the offender to the penalty of two pounds; (*c*) and the taking *fish* is by the same act especially prohibited under certain penalties. (*d*) The taking *deer*, (*e*) and *hares* and *conies* in warrens or places used for breeding or keeping the same, (*f*) also is prohibited and punishable under the same act. With respect to *game* in general, full provisions are enacted by a still more recent act. (*g*)

Decoys (being a preserve for wild fowl) are merely protected at common law; and if they, by long permission of, or without interruption from the owners of adjacent property, become established, such owners may so far become restrained in the free enjoyment of their own adjacent land, that they could not legally, at least after twenty years' quiescent enjoyment, fire off a gun so near the same as to frighten away the fowl, and would be liable to an action for so doing; (*h*) but the recent acts against larceny and malicious injuries, and for the protection of game, do not contain any enactments for the protection of decoys or wild fowl, though there are enactments relating to *snipes* and the *eggs* of wild fowl. The law recognizes no property whatever in *rooks*, and therefore no action lies for maliciously firing off guns so near to a *rookery* as to frighten the birds and deter them from breeding in the plaintiff's trees. (*i*)

2. With respect to *inanimate* tangible property, either actually moveable or capable of being removed or separated without great injury to the realty, they are generally known by the appropriate technical terms "*goods and chattels*," and which include for some purposes, money, valuable securities, and other mere personal effects. (*k*) But there are other expres-

2. Inanimate
moveable per-
sonal property;
and what are
"goods and
chattels."

(*b*) 7 & 8 Geo. 4, c. 29, s. 31.

(*c*) *Id.* s. 33.

(*d*) *Id.* s. 34, 35.

(*e*) *Id.* s. 26, &c.; 9 Geo. 4, c. 69; 5 Car. & P. 135. *Deer*, in a private inclosure, may be distrained, 3 Thomas's Co. Lit. 261, note (11); Co. Lit. 47, a, note (11); Hargrave's 3 Bla. Com. 8;

and Willes's Rep.

(*f*) 7 & 8 Geo. 4, c. 29, s. 50; and see the Game Act, 1 & 2 W. 4, c. 32.

(*g*) 1 & 2 W. 4, c. 32.

(*h*) 11 East, 574; 2 Bar. & C. 934.

(*i*) 2 Bar. & C. 934; 4 Dowl. & R. 518.

(*k*) 2 Bla. C. 384, 387; 7 Taunt. 188; 4 Moore, 73; 4 B. & Ald. 206, *post*.

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sions which have from time to time been used, especially in wills and in acts of parliament, which have received particular construction. The term "*goods and chattels*" include not only personal property in possession, but also choses in action, presently enumerated.^(l) The term "*chattel*" is more comprehensive than that of "*goods*," and will include all animate as well as inanimate property, and will also include a *chattel real*, as a lease for years of house or land, which, though issuing out of land, is not, as we have seen, considered to be real property, and does not descend to the heir, but passes like other personality to the executor of the owner,^(m) and as personality, not *real* property, under the insolvent acts.⁽ⁿ⁾ So *trees* sold or reserved upon a sale,^(o) and *emblemments*,^(p) pass under the term "*chattel*." The term "*goods*" will not, in a deed or contract, in general, include "*fixtures*," but the word "*effects*" would embrace them,^(q) and even invalid Exchequer bills are *effects* within the meaning of 15 Geo. 2, c. 13;^(r) and the words "*effects* both real and personal," in a will, would even pass freehold estates, and all chattels whether real or personal.^(s) The term "*property*" has received various constructions; it has been held, that a bequest of "all the testator's *property*" in a particular house, will not pass a bill of exchange, mortgage bond and banker's receipt, though cash and bank notes would have passed, they being *quasi* cash, because bills and bonds are considered as mere evidence of title to things then out of the house, and not actual things or property in it;^(t) nor can a bank note or bill of exchange, or deed, or security, or other chose in action, be taken in execution or as a distress for rent, though in general all visible goods and chattels may be taken.^(u) However, bills of exchange are "*goods and chattels*" within the Bankrupt Act, so that the fraudulent delivery of them in preference to a particular creditor has been holden to constitute an act of bankruptcy.^(x)

With respect to the meaning and effect of the words "*goods and chattels*" and other expressions in a *will*, it has been held, that the word "*goods*," and equally the word "*chattels*," used simply and without qualification, will pass the *whole* personal estate, including even stock in the funds; but whether stock will or will not pass under the word "*monies*," or under the

(l) 12 Coke, 1; 1 Atk. 182.

(m) Co. Lit. 118.

(n) 3 Russ. R. 376. Leaseholds, however, as relating to land, will be considered in the next chapter.

(o) Toller, Ex. 2d ed. 194, 195; Hob. 173; 11 Coke, 50; Com. Dig. Biens. II.; 2 Saund. Index. *Trees*.

(p) Com. Dig. Biens, A. 2. *post* 90, 2.

(q) 7 Taunt. 188; 4 J. B. Moore, 73; 4 B. & Ald. 206.

(r) 1 New Rep. 1.

(s) 3 Bro. P. C. 388.

(t) 1 Sch. & Lef. 318; 11 Ves. 662.

(u) Hardw. 53, and 9 East, 48.

(x) *Cumming v. Baile*, 6 Bing. 371.

word "*goods*," or under the word "*chattels*," depends upon the whole context of the will, and it was held, that a bequest of "all monies, goods, *chattels*, clothing, &c. the testator's property, which may remain after paying my funeral charges and debts," will pass the testator's interest in stock and money, (y) but a bequest of "all the rest of my *money*," without other words, will not pass *stock*. (z)

Ships and *Vessels*, in respect of their great importance in commerce, have been distinguished by particular enactments, and in many respects, and principally by the *Register Acts*, relating to their construction, and the *evidence* of their ownership, and the modes of transfer. (a) The Bankrupt Act also expressly exempts ships, the mortgage or transfer of which has been duly registered, from passing under the general law to the assignees of a bankrupt, in respect of his being in possession as reputed owner, (b) and even a new rudder and cordage bought specifically for such a ship, though not actually attached to it at the time of the act of bankruptcy of such mortgagor, will stand on the same footing as the ship, and will pass to the mortgagee as parts thereof; (b) and a contract relating to the sale of a ship need not be stamped. (c) A ship usually is described by name, together with all her tackle, apparel, rigging, sails, yards, and furniture thereto belonging, of the value of so much, and which description is usual and proper in trover. (d) There are several particular provisions against criminal injuries to ships, which will hereafter be noticed. (e)

3. Various growing *vegetables*, termed in law *emblements*, and properly speaking the profits of *sown* land, but extended in law not only to growing crops of corn, but to roots planted, and other annual *artificial* profit, are deemed *personal property*, and pass as such to the executor or administrator of the occupier, whether he were the owner in fee, or for life, or for years, if he die before he has actually cut, reaped or gathered the same; and this, although these being affixed to the soil for some purposes, might be considered, whilst growing, as part of the realty. All vegetable productions are so classed when they

3. Growing plants vegetables, crops and emblements.

(y) *Kendall v. Kendall*, 4 Russ. R. 360. The cases in equity which break in upon the extensive application of the words "*goods* and *chattels*," proceeded upon the particular language of the wills upon which they arose, *Id.* 370; 3 Swinb. 930.

(z) *Gosden v. Dotterell*, at Rolls' Court, 14 Dec. 1832; see *post*, 96, 97, title *Stock*.

(a) 6 Geo. 4, c. 109, 110; 7 Geo. 4, c. 48; see *Chit. Col. St. Ships*.

(b) 6 Geo. 4, c. 16, s. 72; and see 5 B. & Ald. 918.

(c) 6 Geo. 4, c. 41; 1 Dans. & Lloyd, 35; 2 Man. & R. 121.

(d) *Morg. Prec. Trover* for a Ship.

(e) 7 & 8 Geo. 4, c. 30, s. 9; and see 4 C. & P. 559, 569, *post*.

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are raised annually by labour and manure, which are considerations of a personal nature. They include *corn* growing and the year's produce of growing *crops*, though from old roots, *(f)* and of saffron, hemp, flax, and as it seems, clover, saintfoin, and every other yearly production, in which art and industry have combined with nature. *(g)* But *natural* meadow grass, though previously manured, and bush harrowed, and shut up for a crop of hay, does not go to the executor, if his testator die before severance; *(h)* nor fruit growing on trees; *(i)* though on the above principle growing melons, cucumbers, artichokes, parsnips, carrots, turnips, and the like, belong to the executor, in respect to the labour and trouble in cultivating and rearing those annual productions. *(k)* Manure in a heap, before it is spread on the land, is also a personal chattel. *(l)* If a tenant for life or *pur auter vie* die, his executor is entitled to emblements, *(m)* and the advantages of emblements are extended to parochial clergy by the statute 28 Hen. 8. c. 11; *(n)* but a parson who resigns his living, or forfeits by his own act, *(o)* is not entitled to emblements, although his lessee is. *(p)* By *devise* the devisee may, without express words, be entitled to the growing crops. *(q)* But a *legatee* of the goods, *stock*, and moveables on a farm, is entitled to growing corn in preference both to the devisee of the *land* and the *executor*. *(r)* So a tenant at will or sufferance, the duration of whose tenancy is uncertain, is, if the lessor suddenly determine the tenancy, entitled to emblements, *(s)* and at common law, *fructus industriales*, as growing corn and other annual produce, which would go to his executor upon death, may be taken in execution, *(t)* but the appraisement and sale thereof are regulated by statute, *(u)* and by statute growing crops may be taken as a distress, and sold when ripe. *(v)* But a crop of *natural* grass, growing at the time of the death of a tenant for life, does not belong to his executor, but goes to the remainderman. *(x)*

(f) Co. Lit. 55 b, note (1); Cro. Car. 515.

(g) Com. Dig. Biens, G. 1; Co. Lit. 55 b; 2 Freem. 210; 2 Bla. C. 122, 123; Toller, 2d ed. 149, 194.

(h) Swinb. 934; Toller's Ex. 194, 2d ed. 192; 6 East, 604; 8 East, 339; 9 B. & C. 577.

(i) Toller's Ex. 2d ed. 192, 193.

(k) Rol. Ab. 728; 4 Burn's Ecc. L. 254.

(l) 11 Vin. Ab. 175; Sty. 66.

(m) Toller, 2d ed. 203.

(n) 1 Rol. Ab. 655; 2 Bla. C. 123; Toller, 2d ed. 207.

(o) 7 Bing. 154.

(p) 2 B. & Ald. 470.

(q) 6 East, 604; 8 East, 339; 2 Bla. C. 122, note 4, 403, 404; Toller, 2d ed. 202, 203.

(r) Id. ibid.; Winch, 51, and other cases; Toller, 2d ed. 203.

(s) 10 Bar. & C. 720.

(t) Tidd, 9th ed. 1001; Gilb. Exe. 19; 1 Salk. 368; 1 Y. & J. 398; 3 Atk. 13; 3 Bar. & C. 368; M'Clel. 207.

(u) 56 Geo. 3, c. 50.

(v) 11 Geo. 2, c. 19.

(x) 9 Bar. & C. 577.

At one time it was held that a crop of growing turnips, growing potatoes, or corn, partook so much of the real property where they were growing and continuing to improve, that a sale of them was in effect a sale of an interest in or concerning land, and that unless the contract of sale were in writing, and signed by the vendor, it was therefore void under the statute against frauds, 29 Car. 2, c. 3, s. 4. (y) Afterwards a distinction was taken as to the degree of maturity, and the time of the year when the sale took place; and if a crop of potatoes were sold in November, when they had done growing, the land was considered and termed merely a warehouse, and the sale in effect only of personalty; (z) but, finally, another and more sensible principle was established, and which still prevails, that when the growing crop is of such a nature as that it would constitute *emblems* going to an executor in case of death, the same, in *whatever* state of maturity it might be, is to be considered as *goods*, and not an interest in land, (a) though it might be otherwise in the case of a sale of a growing crop of *natural* grass. (b) A sale of growing *underwood*, to be cut by the purchaser, has been considered a sale of an interest in land, (c) though after the wood or trees have been cut it would be otherwise. (d) And now a sale of such *underwood* or of growing trees would be considered as merely a sale of goods. (e) It has been observed, that the apparent desire of the courts rather to *escape* from the rule in *Crosby v. Wadsworth*, respecting the sale of a growing crop of meadow-grass, without overruling that case, renders it difficult to apply the law to individual cases. (f)

Growing *plants, vegetables, herbs, and fruits*, are treated like *emblems*, and are enumerated and protected as if personal property by particular enactments against *criminal* injuries, whether in the nature of larcenies or malicious injuries. (g) Thus the stealing any plant, root, fruit, or vegetable production growing in any garden, orchard, nursery ground, hothouse, greenhouse, or conservatory, is punishable summarily before a justice by imprisonment and hard labour, for not exceeding six calendar months, or the payment of the value of the article stolen, and a penalty not exceeding 20*l.*; and a subsequent offence is felony; (h) but a young fruit tree is not a plant or

(y) *Crosby v. Wadsworth*, 6 East, 602; *Emmerson v. Ellis*, 2 Taunt. 138; 2 M. & S. 205.

(z) 2 M. & S. 205; 11 East, 362; 5 B. & C. 829; 3 B. & C. 357.

(a) 9 Bar. & Cres. 577; and see 10 Bar. & Cres. 446; Gow, R. 109.

(b) 6 East, 602; but see 1 Ld. Raym. 182; Sugden's V. & P. 76.

(c) 1 Younge & J. 396; but see 1 Ld. Raym. 182; Sugd. V. & P. 75, 76.

(d) 4 Moore, 547; 6 Moore, 114; 3 Bing. 3.

(e) 9 B. & Cres. 561.

(f) Sugd. V. & P. 8th ed. 77, 78.

(g) 7 & 8 Geo. 4, c. 29, 30.

(h) Id. c. 29, s. 42.

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vegetable production within the meaning of this act; (i) and the stealing any cultivated root or plant used for food or medicine, or distilling, or dying, or any manufacture, not being in a garden, orchard, or nursery ground, is a minor offence, punishable summarily, with not exceeding one calendar month's imprisonment, or the value, and 20s. (j) *Malicious injuries* to the like and other properties are punishable even in an higher degree; (k) and though a tree be not *totally* destroyed, yet if it be cut or broken, and *materially* damaged, the case is within the act. (l)

4. Fixtures, &c.

4. *Fixtures*, if annexed to the freehold for the purposes of *agriculture*, or otherwise than for trade, or where there is a covenant to leave all improvements, belong to the landlord. (m) But when put up for the purposes of *trade*, or when what are usually termed *tenant's* fixtures, such as grates, stoves, &c. they are in general removeable by the tenant; (n) and even trees in a garden, when used for the purposes of *trade*, as in nursery grounds, are removeable by the tenant; (o) but then he must remove them during his tenancy, or they become the property of the landlord; (p) or, at least, a tenant strictly at will must remove within a reasonable time; (q) and if a tenant have covenanted to leave all *improvements*, he cannot then legally remove any fixtures that would rank under such general terms; (r) and in case of the sale of a freehold estate, if the vendor do not remove fixtures before he executes the conveyance, they pass to the purchaser. (s) When removeable by the tenant, the fixtures put up may be taken and sold under an execution against him. (t) But fixtures put up by a freeholder could not be so taken. (u)

Fixtures and growing trees, part of the freehold, and when annexed thereto, cannot by common law or statute be taken as a distress for rent, nor if they be wrongfully so taken will replevin be the proper remedy, as that is sustainable only for taking goods and chattels. (x) So trespass for severing and

(i) *Rex v. Hodges*, 1 Mood. & M. 341.

(j) 7 & 8 Geo. 4, c. 29, 43.

(k) 7 & 8 Geo. 4, c. 30, s. 18; felony as to hop binds, and felony in other cases, *Id.* s. 19 to 29; 2 B. & Cres. 608.

(l) *Taylor's case*, R. & R. 373.

(m) 3 East, 38; 4 Moore, 281, 440; 2 B. & Ald. 165; 2 B. & Cres. 608; 9 Bing. 24; *Amos on Fixtures*; 2 Stark. R. 403; 3 Thomas's Co. Lit. 233, 234, note (3).

(n) *Id.* *ibid.*

(o) *Panton v. Roberts*, 2 East, 88.

(p) 1 B. & Adolp. 394; 1 Hen. Bla.

258; 2 East, 88; 8 Bing. 186.

(q) 10 B. & Cres. 720.

(r) 9 Bing. 24; 3 Simons, 450; 1 Taunt. 19; 2 B. & Cres. 608.

(s) 2 Bar. & Cres. 76.

(t) 1 Salk. 368; 3 Atk. 13; M'Clel. 217; 3 B. & C. 368; Tidd, 9 ed. 1001.

(u) 5 B. & Ald. 625; Tidd, 9 ed. 1002.

(x) *Fixtures*, 4 T. R. 584; 2 Saund. 34; *Machinery fixed*, M'Clel. 217, 218; *Trees*, 3 Moore, 96; 13 Price, 459; 2 Id. 491.

taking away fixtures is the proper remedy, and not trover. In trespass for taking goods, chattels, and *effects*, the plaintiff might recover the value of severed fixtures, but not so for taking goods and chattels only; (*y*) and unsevered fixtures are not recoverable in trover; (*z*) and an assumpsit for goods, wares, and merchandize sold, without adding *effects*, the price or value of *fixtures* could not be recovered. (*a*). These instances show the necessity for keeping in view the distinction between removeable and actually fixed property, although the latter might be readily removed.

It was always a larceny and felony at common law, if the owner, or a stranger, or the thief, sever the fixtures and chattels from the freehold, and the thief *afterwards*, at a subsequent distant time, come and steal them, but not if he severed them and immediately afterwards carried the same away; (*b*) but such severances and taking at the same time, or attempting to sever from any building, or wherever fixed on any land, are now provided for by 7 & 8 Geo. 4, c. 29, s. 37 to 45; and it should seem that the stealing of brass fixed to any house, church, or other building or land, (*c*) or even to tombstones in a churchyard, is a felony under that act. (*d*)

5. There are some description of personal property tangible and moveable of a *mixed* character, or, as Blackstone describes, of a mongrel amphibious nature, such as an *heir-loom*, or *tombstones*, *monuments*, &c. (*e*) in a church, or the coat of armour of an ancestor there hung up with the pennons and other ensigns of honour suited to the degree, and which Courts of Equity so far regard, that besides an action of detinue or trover, a bill may be sustained for the specific delivery thereof, (*f*) and they descend to the heir. (*g*) The title deeds to an estate are of this nature, and follow the legal interest, and belong to the legal owner for the time being; and yet, as being moveable, may be the subject-matter of personal actions, as trover or detinue. (*h*)

5. Property partaking as well of reality as of personality.

Shares in *canals*, *bridges*, &c., though interests issuing in a degree out of real property, are usually to be considered as personality, and consequently they give no right to vote for a member of parliament, though under a particular statute it was held that

Canal shares, &c.

(*y*) 4 B. & Ald. 206.

(*z*) 2 Bar. & Cres. 76.

(*a*) 2 Marsh. R. 495; 4 J. B. Moore, 73; 4 B. & Ald. 206.

(*b*) 1 Hale, 510; 3 Inst. 109.

(*c*) 1 East's P. C. 592; R. & R. C. C. 69.

(*d*) 4 Car. & P. 377.

(*e*) As to monuments, *ante*, Burial, ch. ii. p. 50; and Jacob's R. 180.

(*f*) Chit. Eq. Dig. Chattels personal; and Id. tit. Estate, 1X.

(*g*) 2 Bla. C. 428, 429.

(*h*) 3 Bar. & Adol. 174; 4 Bing. 106; 2 Bla. C. 428.

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6. Stock and
property in
funds. (k)

a widow was entitled to dower in respect of such an interest, which in that act was declared freehold. (i)

6. With regard to an interest in *the funds* or *stock*, it is a peculiar description of *personal* property, expressly declared to be such, and not to descend to an heir. (l) It is a property founded on numerous statutes, and sometimes, as in the case of the five *per cent.* bank annuities, is merely a right (though saleable) to receive *interest* in the name of dividends, in consideration of the delivery of a sum of money for the purchase of such interest. (m) It is therefore not subject to a poor rate. (n) It is a mere chose in action. (o) It is devisable, and although a statute has required two witnesses to attest the will, they are not deemed essential in equity. (p) But no interest vests in the legatee of stock before the executor has assented. (q) It cannot be taken in execution, nor can the dividends payable to the owner be sequestrated, (r) though the entire interest is liable to distribution under the statutes against bankrupts (s) and insolvent debtors. (t) Transfers of stock are expressly exempted from the stamp duty; (u) and the better opinion seems to be, that an agreement for the sale of *stock* is not within the statute against frauds, which requires agreements for the sale of "*goods*, wares, and merchandize" to be in writing, though that point seems to be still open to discussion. (r) There is a material difference between a bequest of stock and a devise of land; if a person devise his land to another, and afterwards convey it away and purchase it again, or if he materially change the nature of his estate, the devise is revoked, and the devisee takes nothing; but in case of the bequest of *stock*, if after making his will, the owner sell it out, and afterwards buy it in again, this is no ademption or revocation, for if the selling of the stock was evidence of his having altered his intention, his buying it in again is considered evidence equally strong that he means the legatee should have it, and a will of personalty is ambula-

(i) *Hollis v. Goldfinch*, 1 B. & C. 205; *King v. Thomas*, 9 B. & C. 114; but see 2 Ves. J. 651; 4 Ves. J. 542; 1 Geo. 4, c. 24; 34 Geo. 3, c. 90; 45 Geo. 3, c. 70; Rogers on Election, 27; see further, *post*, ch. iv.

(k) See in general Comyns on Contracts, 84 to 86; 3 Chit. Crim. L. 284; Harrison's Index, tit. Stock; and Chit. Eq. Digest, tit. Stock.

(l) 1 Geo. 1, st. 2, c. 19, s. 9; 1 Russell's R. 583.

(m) See in general *Clarke v. Powell*, M. T. 1832, K. B. Newman, attorney for plaintiff; Bailey, attorney for defendant.

(n) 6 East, 182; 1 Nol. P. L. 160,

216; Burn's J. tit. Poor, 67, 68.

(o) *P— v. Copper*, 5 Price's R. 217.

(p) 1 Russell's R. 589; see statutes, 33 Geo. 3, c. 28, s. 14; 35 Geo. 3, c. 14, s. 16; 7 Ves. J. 452; 2 Bla. C. 502, note (18).

(q) 1 Russ. R. 596.

(r) *McCarthy v. Gould*, 1 Ball & B. 327.

(s) 6 Geo. 4, c. 16, s. 63.

(t) 7 Geo. 4, c. 57.

(u) 55 Geo. 3, c. 184, schedule, tit. Conveyance.

(v) Comyn's R. 354; 2 P. Wms. 307; 6 T. R. 67; 3 Chit. Commercial L. 284.

tory until the instant of death. (x) A bequest of all monies, goods, *chattels*, clothing, &c. will pass the testator's interest in stock, (y) but a bequest of "all the rest of my *money*" will not pass stock. (z)

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With respect to *deeds and other writings* they, as far as respects the money or contract secured by them, are considered to be *choses in action*, for some purposes, so that at common law no indictment could be sustained for taking or damaging them; but which offence, as well as the forging of them, are now made punishable. The recent statute 7 & 8 Geo. 4, c. 29, s. 5, (a) enacts, that if any person shall *steal* certain enumerated *securities*, such as a tally, order, or other security, entitling or evidencing the title of any person or body corporate, to any share or interest in any public stock or fund, whether of this kingdom or of Ireland, or of any foreign state, or in any fund of any body corporate, company, or society, or to any deposit in any savings' bank; or shall steal any *debenture, deed, bond, bill, note, warrant, order, or other security whatsoever for money, or for payment of money*, whether of this kingdom, or of any foreign state; or shall steal any warrant or order for the delivery or transfer of any *goods or valuable thing*, he shall be guilty of felony, of the same nature, and in the same degree, as if he had stolen any *chattel* of the like value, and that each of the said documents shall, throughout that act, be deemed for every purpose to be included under and denoted by the words "*valuable security*." Those words, therefore, introduce a new and comprehensive term, as far as regards *such documents* in criminal proceedings. But in order to bring either of the enumerated securities within the protection of the larceny act, it must, at the time of the offence, have been an available security; and, therefore, if a bill or note be not properly stamped, or if it be payable upon a contingency, the stealing it

Securities for
money, &c.

(x) *Partridge v. Partridge*, Cas. T. Talb. 226; 1 Russ. & M. 629; Toller, 2 ed. 333; and see 1 Russ. & M. 221, &c.

(y) *Kendall v. Kendall*, 4 Russ. R. 360.

(z) 1 Turn. & R. 260, 272; *Gosden v. Dotterell*, in Roll's Court, 14th Dec. 1832. In this case the testator, after giving a pecuniary legacy of 100*l.*, bequeathed to his brother "all the rest of his *money*," and then disposed specifically of certain personal chattels. It appeared there was a considerable sum of stock, which, as well as some articles of household furniture not specifically bequeathed, the testator had not noticed in his will; and the question was, whether the gift of "all the rest of

his money," after the pecuniary legacy, would pass this sum of stock. At the hearing, his Honour had stated that the inclination of his opinion was unfavourable to that construction; and on looking into the authorities his impressions had been confirmed. The term "*money*" could not pass stock without context, and there was no context in this instance to explain that by that term the testator meant the stock to pass. Whatever, therefore, might be conjectured on the subject of intention, the court was not at liberty to depart from its settled principles which applied to cases of this nature.

(a) See Ry. & Mood. C. C. 155.

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will not be punishable under this act, (b) though it would be otherwise as respects forgery. (c)

At common law also actions may be supported for injuring or taking away either of those documents, when of any value, precisely the same as if they were any other personal chattel; (d) and when they relate to real estate, the ownership of the latter generally draws to it the property in the deeds; (e) and a person may even be held to bail and arrested in an action of trover or detinue, for a deed sworn to be of a named value, by leave of a judge. (f) So that although these documents are mere evidence of a right to receive money or property, and are not the thing itself, and are therefore considered to be choses in action, yet for many purposes they are considered to be of equal value, and, as in the instance of bank notes, are transferred from one to another precisely as money.

2. Personal
rights in possession,
but not
tangible, as copy-
rights, &c.

2. There are also a description of personal property which, though in possession as respects the right, and consequently not strictly choses in action, yet differ from mere goods, because they are not tangible or visible, though the thing produced from the right may be perfectly so. Such as copyrights and patent rights, either in books, music, (g) busts and sculptures, (h) engravings and prints, (i) and patterns for prints for linens, cottons and calicoes, (k) and patents in general. (l) These are protected and regulated by various acts and decisions. (m) In these instances the subject-matter of the right is not the book, the bust, &c. produced, but the exclusive privilege of continually, for a certain term, printing or making and vending the article; such right or privilege is obviously not tangible; it is, therefore, a chattel unlike tangible, moveable property; it could not be seized or sold under an execution against the goods of the proprietor, could not be attached, nor be the subject of a *donatio mortis causa*, and, independently of any statute regulation, could not in any case pass by delivery, for it exists only in legal contemplation. The transfer of a copyright in a book or song must, by express enactment, be in writing, and attested by two witnesses, so as to pass the interest, and enable the assignee to maintain an action for pirating

(b) *Rex v. Yates*, Car. Cri. L. 273; R. & M. C. C. 170. S. C.; Chit. on Bills, 8 ed. 766, 767.

(c) Chitty on Bills, 8 ed. 742. See present act against Forgery, stat. 11 G. 4, c. 66, id. 735 to 741.

(d) 4 T. R. 229.

(e) *Id. ibid.* 3 B. & Adolph. 170.

(f) 9 East, 325; 1 Taunt. 203; 8 Price, 507; Tidd, 9th ed. 172.

(g) 3 Anne, c. 19; 34 Geo. 3, c. 156.

(h) 34 Geo. 3, c. 56.

(i) 8 Geo. 2, c. 13; 7 Geo. 3, c. 38; 17 Geo. 3, c. 57.

(k) 27 Geo. 3, c. 58; 34 Geo. 3, c. 23.

(l) 21 Jac. 1, c. 5.

(m) See the above acts and decisions collected. Chit. Col. Stat. tit. Copyrights, and fully, *post*, *Injunctions*.

it; (n) though, perhaps, an admission of an assignment by a wrong-doer might suffice. (o) In all other respects the interest in the privilege resembles other personal property, and would pass under the Bankrupt Act and Insolvent Act to the assignee and to the executor or administrator, in case of death, under a bequest of goods and chattels.

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3. The *next principal description* of personal property are *choses in action*, that is, rights to receive or recover a debt, or money, or damages, for breach of contract, or *for a tort* CONNECTED *with* contract, but which cannot be enforced without *action*, and, therefore, termed *choses*, or *things in action*. (p) Here we must distinguish between the deed, or bill of exchange, or other *security* for a debt, or document affording *evidence and security* of a right, and the thing ultimately to be recovered, though in general both are denominated choses in action. The *deed*, or *writing*, whether on parchment or paper, is itself, for some purposes, a chose in *possession*; and we have seen that the delivery of bills of exchange, by way of fraudulent preference, has been holden to be a delivery of goods and chattels within the Bankrupt Act. (q) But the *money* and *damages*, thereby secured, are strictly choses in action until actually reduced into possession.

3. *Choses in action.*

The *principal distinctions* between personal tangible property in possession, and choses in action, are several. *First*, the former, whether money or goods, may be taken in execution and sold for the debt of the owner, whilst ~~he~~ *he* ~~either~~ *either* is or is entitled to *immediate* possession; (r) whereas no *chose in action*, or mere security for a debt or performance of a contract, can be so taken or legally seized or transferred, not even a bank note, (s) and *a fortiori*, not a bill of exchange, promissory note or check on a banker, or a deed, or any writing; although the money thereby secured might be immediately received. (t) Nor can a debt or claim upon a third person for damages, though intrinsically as valuable as any goods in possession, be

Distinctions between things in possession and choses in action.

(n) 3 Maule & S. 7; 2 B. & Cres. 866; 2 Stark. R. 382.

(o) 4 Campb. 9; 1 Jac. & W. 481. To pass the *contingent* benefit of survivorship, see *post*, 107, n. (y)

(p) See in general 2 Bla. Com. 396, 397; Com. Dig., Biens; Harrison's Dig. tit. Chose in action; Chit. Eq. Dig. Chose in action. Mr. Justice Blackstone states, that all property in action depends entirely upon *contracts*, express or implied. But it is apprehended that such explanation of the term *chose in action* is too li-

mitted; they certainly include rights to recover *damages* for a *tort*, though a contract is the most usual *instance*.

(q) *Per* Tindal, C. J., 6 Bing. 371, *ante*, 90.

(r) Goods and cattle in all cases, and money when in a bag, Dougl. 231; but see 4 East, 510; 9 East, 48; 7 Moore, 127; 3 Bro. & Bing. 294, S. C.; Tidd. 9th ed. 1003.

(s) Rep. T. Hardw. 53; 9 East, 48.

(t) R. T. Hardw. 53.

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taken adversely in execution at the suit of a subject. So an interest in the stocks or funds cannot be seized or sold under a writ of *fiery facias*, or other process, at the suit of a *single* creditor,^(u) though in case of *general* insolvency and bankruptcy or discharge under the Insolvent Act it is otherwise.^(v) Secondly, the *transfer* of a chose in action differs in form and effect from that of a personal thing in possession, for though in general the beneficial interest in a chose in action may be transferred by parol and without writing, yet (with the exception of bills of exchange and notes, and a few other particular documents,) the *legal* interest does not pass so as to enable the assignee of the interest to enforce payment or sue in his own name; and he must, in general, proceed in the name of the original proprietor. In order also to *perfect* the transfer, even of the beneficial interest, it is essential that the assignee or purchaser should give notice of the transfer to the debtor, or other contracting party, for otherwise, in case of the bankruptcy of the transferer, the benefit of the intended transfer will be lost,^(w) but which notice is wholly unnecessary when the possession of tangible property itself is immediately delivered to the purchaser. A *third* distinction has prevailed between tangible things in possession, and at least some choses in action, namely, that the former always might pass as donations *mortis causa*, (i. e. delivery by way of gift without consideration, in immediate expectation of, and shortly afterwards followed by death.)^(x) So also some descriptions of choses in action, as bonds and bank notes, were always held to pass by such a delivery;^(y) but until recently it was considered that bills of exchange, promissory notes, checks, and other documents, could not so pass;^(z) and though it has been recently established in the House of Lords, that the latter securities also may so pass by such gift;^(a) yet where there is no written security, it would be otherwise; and a free gift must be most distinctly established to have been made without fraud on the part of the donee.^(b)

And here it may be expedient to advert to the construction of the terms of a will or deed, as applicable to *personal* property. Upon a devise in this country, merely of a "farm,"

(u) *Ante*, 96; 1 Ball & B. 387.

(v) *Ante*, 96.

(w) 2 Simons, 257, 570; 3 Russ. R. 12, 13.

(x) See in general Chit. Eq. Dig. *Donatio Mortis Causa*, 323, and *post*, 105.

(y) *Id.* *ibid.*

(z) *Id.* *ibid.* Chit. on Bills, 7 & 8 ed.

page 1 & 2 in notes.

(a) *Duffield v. Hicks*, 1 Bligh's R. New S. 497; 1 Dow. New S. 1; *Ranken v. Heguelin*, at Rolls, 14 June, 1832; Chit. on Bills, 8th ed. 791; and see *Semins v. Cox*, 3 Law J. 44.

(b) *Semins v. Cox*, 3 Law J. 44, and Chit. on Bills, 8th ed. 791.

the *farming utensils* would not pass, (b) though we have seen that a bequest of goods, "stock and moveable," would pass to the legatee "*growing crops*." (c) In Jamaica, negro slaves were considered part of the real estate (though assets for the payment of debts) and they, therefore, passed under a devise of rents, issues and profits of the estate, to the devisee. (d) When in a bequest of personalty there is a doubt in the meaning of technical terms, as in the will of a statuary, they may be explained by extrinsic evidence and examination of artists well informed in the manufacture. (e)

In most descriptions of personal things, the owner may have either the *absolute* and entire interest, or only a *qualified* or temporary interest; as a bailee of various descriptions, or for a special purpose; and, as regards the *time* of enjoyment, his right may be to the *immediate* possession, or only to the possession at a future time. It was formerly held otherwise, but upon the whole, by a series of decisions, it is now settled, that every species of property, whether personalty or realty, is, in substance, equally capable of being settled in the way even of *entail*; and, though the modes of so settling the same vary according to the nature of the subject, yet they tend to the same point, and the duration of the entail is circumscribed *almost* as nearly within the same limits as the difference of property will allow. (g) It is perfectly settled, that whether there be a bequest for life of the thing itself, or of its use only, a limitation over upon the death of the legatee will be supported, and that chattels may be limited in strict settlement by testament, or otherwise, so as to answer all the purposes of an entail, though considerable care and skill are necessary in using proper terms for the purpose. (h) The remedies and punishments frequently depend on the precise nature of these interests, and each of which will be explained in the progress of these pages. It may suffice here to allude to one familiar instance; if the owner of a personal chattel has divested himself of the *right* to immediate possession, as by letting furniture for a term of years, he cannot support an action of trespass or trover for an injury committed to the same during that time, those actions being proper only when the owner has possession in fact, or, at least, the right to immediate possession; but he

Secondly. The extent of interest, and, Thirdly, time of enjoyment of personal property. (f)

(b) *Stuart v. Bute*, 11 Ves. 657.

(c) *Ante*, 92.

(d) 3 Simons, 398.

(e) *Id.* 24.

(f) See division of subject, *ante*, 84.

(g) As to the entails of terms for years of personal chattels, see 8 Co. 94; 10 Co.

46, b.; Sir W. Jones, 15; 1 P. Wms. 1; Fearn, 2nd ed. 122 to the end; see valuable notes on 1 Thomas Co. Lit. 516, n. 7; 2 Id. 578, note A; 3 Id. 296, note D.

(h) *Id.* *ibid.* See 2 Roper on Legacies, 393; and note (13) in 2 Bla. Com. by Chitty, 398.

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must proceed by action on the *case* for the injury, when it affects his reversionary interest, as by an absolute sale and permanent injury. (i)

Fourthly, The number of Owners in the same personal thing.

Things personal may also belong not only in severalty to one person alone, but in *joint tenancy* and in *common*, as well as real estates; but they cannot be vested in coparcenary amongst females, because they do not *descend* from ancestor to heir like realty, but in the absence of a will vest in the administrator for the use of creditors; and as to any surplus, equally amongst the next of kin. When strictly in *joint tenancy*, then the *jus accrescendi* applies, and the survivor will be entitled, at least at law, to the whole interest. But in cases of *tenancies in common* and *ordinary partnership* in trade, upon the death of a part owner, his share of the stock and debts belong *beneficially* to his executor or administrator, in respect of the maxim, *inter mercatores jus accrescendi locum non habet*; (j) but the *legal* right of action for any past injury, or to recover any debt due to the two or to the partnership, is vested in the survivor; and at law, in the case of a joint debt, the executor of the deceased partner cannot be sued, though in equity he might be (unless he were a mere surety); and hence it may frequently be important for creditors and others to obtain from several partners a security which in its terms is *several* as well as joint, and upon which the executor of the deceased may be separately sued. (k)

Fifthly, The modes by which a right to personal property, whether in possession or in action, may be acquired.

Fifthly, The *Modes of acquiring and losing* a title to personal things are usually enumerated to be, 1st. Occupancy or mere possession; 2ndly, Prerogative; 3rdly, Forfeiture; 4thly, Custom; 5thly, Succession; 6thly, Marriage; 7thly, Judgment; 8thly, Gift; 9thly, Grant (more properly *assignments*); 10thly, Contract; 11thly, Bankruptcy; 12thly, Insolvency; 13thly, Administration; 14thly, Testament. (l) We will notice each, but only particularly consider those which most frequently are the subjects of litigation.

First. *Occupancy or mere possession.* Under this head may

Title by occupancy or possession.

(i) 4 T. R. 439; 7 T. R. 6; 15 East, 607; and other cases 1 Chit. Pl. 191, 195.

(j) Co. Lit. 3, 282, 182; 1 Meriv. R. 564. But the *good-will* of a partnership trade survives, unless expressly provided otherwise, 5 Ves. J. 539; 15 Ves. J. 218; 1 Jac. & W. 267. If two persons take a farm, though the *stock* will be divisible (2 Bla. C. 299), the *lease* will survive, unless they lay out money jointly in improving its value; and then such employment

of their joint money is considered in the way of trade, so that it alters the estate in the lease at law, and makes it equitable and divisible, 1 Ves. J. 435.

(k) 1 East, 497; 2 Salk. 44; Vin. Ab. Partner, D.; 3 Russ. R. 424.

(l) See 2 Bla. C. 400 to 520, and Chitty's notes as to the modern cases. The 12th head of insolvency is introduced as founded on the General Insolvent Act, 7 Geo. 4, c. 57.

be properly classed those things that become the property of the first *taker* or first *inventor*; the former are lost goods of an unknown owner found. (*m*) Animals *feræ naturæ*, fish taken from the sea, property wrongfully intermixed with that of the owner, copyrights and other inventions and patents. So, things taken by *capture* from an *alien* enemy, and even emblements are also, though improperly, classed under this head. Questions respecting hostile capture, when supposed to have been illegal, cannot be directly discussed in any court in this kingdom, excepting the Prize Court of the Court of Admiralty, and then not as part of the general jurisdiction of that court, but under a particular commission from the king, (*n*) though the Court of Chancery still has jurisdiction against a party in whose favour the Prize Court has decided in cases of fraud or trust. (*o*)

Secondly. Under title by *Prerogative* are classed Taxes and Customs, belonging to the king by virtue of his prerogative. Game also has been classed under this head, though the correctness of that arrangement is questionable; and now by the recent act game is properly made an incident to the land upon which it may happen to be. (*p*)

Thirdly. Title by *Forfeiture*, as goods forfeited for crimes. (*q*) Personal property, though not belonging to a felon at the time of his conviction, upon which he was sentenced to transportation, but accruing to him afterwards, but before the term of his transportation has expired, is forfeited to the crown. (*r*)

Fourthly. Under title by *Custom* are classed (although improperly) heriots, mortuaries, and heir-looms, charters, title deeds, and court rolls, though the latter seem more properly to be incidents to a *real* estate, and pass as belonging to the same by descent or purchase. And even rights to *pews* have been singularly classed under this head, though they certainly seem more in the nature of real property, and pass as such, and will be therefore considered in the next chapter.

Fifthly. Title by *Succession* imports goods and property which pass to the succeeding members of a *corporation* by as it were a political descent.

Sixthly. Under title by *Marriage* are included as well the rights to personal property of a wife, which vests in or may be

(*m*) See the cases under the law of larceny, 3 Barn's J. Larceny, I. (6) 577, 578.

(*n*) *Ante*, 2, note (*b*), *Caux v. Eden*, Doug. 573; *Elphinstone v. Bedeaceland*, Knapp's R. 316 to 361; *Hill v. Reardon*, 2 Sim. & Stu. 431; *Advocate G. Bombay v. Amerceland*, Knapp's R. 329.

(*o*) *Hill v. Reardon*, 2 Russ. R. 608, qualifying, 2 Sim. & Stu. 431.

(*p*) 1 & 2 W. 4, c. 32.

(*q*) See in general 1 Chitty's Crim. L. 732 to 738.

(*r*) 1 Russ. & M. 752, and cases there cited; 2 Bar. & Ald. 258.

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acquired by a *husband* in right of his wife, but also *her* rights, especially when he survives, to her *paraphernalia* and *choses in action*, which the husband did not reduce into possession or recover during the coverture. An assignment by husband and wife of her *reversionary* interest in a personal chattel, though for adequate consideration, will not affect her interest if she survive. (s)

By Judgment.

Seventhly. Title by *Judgment* includes the exclusive right which an *informor* acquires by his first action for a *penalty* given by a popular or penal statute, before the commencement of which action it is not vested in any one in particular, and which right is afterwards perfected by his obtaining judgment therein; (t) and to this are to be added all judgments for a sum certain, or for damages or costs, which a person may obtain in his favour, and which was before contingent or uncertain, but was perfected and rendered a right of a higher nature by the judgment. In order however to give a judgment creditor a perfect right, it must be docketed, so that persons searching in the proper office may always discover its existence; and judgments not docketed have no preference to other debts against heirs, executors, or administrators; (u) and a judgment in the Mayor's Court upon a foreign attachment will not constitute the party a judgment creditor, so as to entitle him to a preference in the administration of assets. (x)

By Gift and
Donatio mortis
causa.

Eighthly. Title by *Gift* includes all *gratuitous* transfers of personal property, and which may be and usually are by *parol*; (y) but in that case must be perfected by delivery, if the chattel be present and capable of immediate delivery; for otherwise, for want of such delivery, the gift is void, unless made by deed. (z) Though perhaps if a person be at a distant place, as at York, and there give his horse, then in London, to another, the latter might have trespass without other possession. (a)

Gifts in expectation of death (*donatio mortis causa*) may be here referred to, (b) though they are usually noticed under the head of Title by Testament, and are in some respects in the nature of a legacy. To perfect such a *gift actual delivery* must be made by the party in his last sickness to the donee, or some third person (c)

(s) *Purdew v. Jackson*, 1 Russ. R. 1 to 72, where see the rights of a feme covert in her personality fully discussed.

(t) 4 Burr. R. 2021, 2490; 1 Marsh. 180.

(u) *Landon v. Ferguson*, 3 Russ. R. 349; when otherwise in equity, Tidd, 9 ed. 938 to 941; Sugd. V. & P. 8 ed. 685.

(a) 1 Sim. R. 484.

(y) 3 Maul & S. 7.

(z) 2 Bar. & Ald. 551.

(a) Clayton, 135; F. N. B. 140; Perkins, 39; 1 Rol. Rep. 61; Vin. Ab. Gift.

(b) *Ante*, 100, Chit. Eq. Dig. *Donatio mortis causa*, and Toller's Ex. 2 ed. 232 to 234.

(c) *Drury v. Smith*, 1 P. W. 404.

for his use; and the donee, or third person, must retain the possession up to the instant of death, and the donor must part with all dominion over it. (*d*) If the thing itself be not capable of delivery, as stock in the funds, then the receipt, warrants, &c. must be delivered. (*e*) And where A. on his death-bed desired B. to call at a certain place and fetch away a watch, adding, that he would then make her a present of it, but no possession was resumed by A. and no delivery made to B.; it was doubted if this could be good as a *donatio mortis causa*. (*f*) Such a gift is in the nature of a legacy; though it need not be proved with the will. (*g*) If the donor recover or survive the immediate danger, the property impliedly reverts to him, because the cause for making the gift has ceased; (*h*) and it has even been questioned whether the donation is not avoided or revoked by a subsequent codicil; (*i*) and because such a gift is in nature of a legacy, it may be, and very frequently is, made to or in favour of a wife, though in general she is incapable of acquiring any property from her husband in his lifetime, because it would instantly revert to him; (*k*) and if a chose in action, as a bond or mortgage security, be so delivered to her or any other person, the executor or administrator or heir of the deceased, in whom the legal right may become vested, is bound to sue for the recovery of the money as trustee for the donee. (*l*) It has been long established that a bond or bank note may be delivered as such a donation; but until recently it was supposed that bills of exchange, promissory notes, and checks on bankers, could not be so delivered; (*m*) but it has been recently decided in the House of Lords that they may be so effectually given. (*n*) And it should seem that ordinary debts, for which no written security has been given, might be so transferred by deed or writing. (*o*) But this mode of disposing of property must be clearly proved, to prevent fraud. (*p*) In Scotland there is an

(*d*) *Burn v. Markham*, 2 Marsh. 532; 7 Taunt. 224, S. C.; Holt, C. N.P. 352; *Hawkins v. Blewitt*, 2 Esp. R. 663.

(*e*) *Ward v. Turner*, 2 Vesey, 431.

(*f*) *Spatley v. Wilson*, Holt, C. N.P. 10.

(*g*) *Miller v. Miller*, 3 P. W. 357, 8; see 36 Geo. 3, c. 52, s. 7, expressly subjecting it to legacy duty.

(*h*) *Per Cowper, Ld. Chan. Hedges v. Hedges*, Prec. Chan. 269; *Gilb. Eq. R.* 12; 2 Vern. 615; *Drury v. Smith*, 2 P. W. 404.

(*i*) 4 Russ. R. 25.

(*k*) *Miller v. Miller*, 3 P. W. 357, 8.

(*l*) *Duffield v. Hicks*, 1 Dow. R., N. S.

1, and 1 Bligh's R., N. S. 497, in House of Lords; *Gardner v. Parker*, 3 Mad. R. 84.

(*m*) See cases collected, *Chitt. Eq. Dig. tit. Donatio Mortis Causa*, and *Chitt. on Bills*, 7 ed., and id. 8 ed. 2, 3.

(*n*) *Supra*, note (*l*); and see *Rankin v. Weguelin*, 14 June, 1832, *Chit. on Bills*, 8 ed. 791.

(*o*) *Tate v. Hilbert*, 2 Ves. J. 120; *Toller, Ex.* 2 ed. 233; and *Duffield v. Hicks*, 1 Dow. R., N. S. 1; 1 Bligh's N. S. 497.

(*p*) *Waller v. Hodge*, 2 Swanst. R. 92; *Jones v. Selby*, Prec. Ch. 300; and *Simere v. Cox*, 3 Law J. 41.

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By grant, or
assignment, and
bill of sale.

express law regarding death-bed gifts, and in general denying effect to the same. Such a donation in England was subjected to the legacy duty by the express terms of 36 Geo. 3, c. 52, s. 7.

Ninthly, is enumerated title by *Grant* as distinguished from *gift*, though that term is now usually confined to a transfer of some easement relating to *land*, as a grant of a right of way or a right of common; and the term *assignment* or *bill of sale*, is usually adopted when speaking of a transfer of *personalty*. It is always supposed to be founded on some *adequate consideration*. A grant, or more properly an *assignment*, when confined to *personalty*, and not a chattel real, may be by parol. (q) And an assignment of a chose in action need not be by deed, (r) and an equitable assignment of a debt may be by simple writing, or by word as well as by deed. (s) In order to constitute even an equitable assignment, there must be an *engagement* to pay out of the particular fund, or appropriate words *transferring* it, inserted in the letter or other instrument, for otherwise, though the intention might readily be supposed, even a Court of Equity cannot supply the omission. (t) A lien upon personal property may be effectually created by parol, and by a mere deposit of the same, or the security relating to a chose in action, though it is essential to perfect the transfer of the latter, at least as against creditors, by giving immediate notice to the parties to the chose in action or contract. (u) But • when a transfer is to be made of personal property of considerable value, as a security for or in satisfaction of a *bonâ fide* debt, it is safer and more usual to make it in writing reciting the consideration, and enumerating every particular article in a schedule, after having the same duly valued by disinterested and competent persons. A *bill of sale* or assignment does not, at least as against creditors, pass any *after-acquired* personal property, (v) though it may pass any subsequently purchased property intended to be annexed to or go with the principal, as a new rudder or boat of a ship; (x) and where there has been material repair, or even subsequent changes and substitutions of new articles for old, the former may pass. It requires express words to pass a *contingent* interest in personal property, and where a person entitled to such an interest assigned “all her

(q) 3 M. & S. 7. An assignment of a lease must be in writing, 29 Car. 2, c. 3, s. 4.

(r) *Howell v. M'Leers*, 4 T. R. 690.

(s) *Heath v. Hull*, 4 Taunt. 326.

(t) *Watson v. Duke of Wellington*, 1

Russ. & Myl. 602, 603, very illustrative of this position.

(u) 2 Simons, 257, 570; 3 Russ. R. 12, 13.

(v) 5 Taunt. 212.

(x) 5 B. & Ald. 918.

furniture, plate, &c. and all other the estate and effects of or to which she was then possessed *or entitled*, to trustees upon trust for creditors," it was held, that such assignment did not pass her then contingent interest in a testator's residuary estate, (y) and it should seem, that an assignment merely of a copyright, without other express words, would not pass the *contingent* interest of an author, upon his surviving twenty-eight years from the time of the first publication of his work. (z) And though in case of personalty an assignment may in general be by parol, it is otherwise as respects a lease or other interest in land, the statute against frauds requiring an instrument in writing, and signed; (a) and the transfer of a copyright should regularly be in writing and attested by two witnesses, though sometimes such a regular assignment will be presumed. (b)

In order to perfect the grant, bill of sale or assignment, the assignee should immediately take possession of the goods, and not suffer any continued, even partial or concurrent, possession by the assignor or his family, or the transfer would be void against creditors ignorant of or not concurring in the transfer, (c) unless in some cases of notoriety of the change of ownership under an execution or otherwise; (d) or where the right to take possession was only in future or contingent, in which case it suffices to take possession immediately the event has happened, though in the mean time creditors may have been misled by the possession having remained in the mortgagor, it being settled that there is no fraud in allowing a continued possession, when consistent with the terms of the deed. (e) If the property assigned be at a distance, as a ship at sea, and cannot be immediately delivered, then possession must be taken of all documents relating thereto, and the transfer be duly registered, and the earliest notice of the transfer forwarded to the party in actual possession; and in the case of a written security, or chose in action, or policy of insurance, not only must possession be taken of the security, but notice of the transfer must be given to the debtor or contracting party, (f) for other-

(y) *Tope v. Whitcombe*, 3 Russ. R. 124. The words of the transfer, to cover any contingency, should be, "and all other rights, titles, interests, trust, property, possession, *expectancy*, *possibility*, benefit, advantage, claim and demand whatsoever, at law and in equity, or otherwise howsoever, of the said A. B. of, in, to, or out of or upon the said [naming the thing transferred, and adding express words adverting to the supposed contingencies]."

(z) 54 Geo. 3, c. 156, s. 8, 9; 2 Stark. R. 385. *Quare*, if the benefit of survivorship should not be expressly assigned.

(a) 29 Car. 2, c. 3, s. 4.

(b) 8 Ann. c. 19, s. 1; 41 Geo. 3, c. 107; 3 M. & S. 7; 2 Bar. & C. 866; 2 Stark. R. 382; 4 Campb. 9; 1 Jac. & W. 481.

(c) *Turner's case*, 3 Coke, 81; 1 Campb. 333; 5 Taunt. 212.

(d) 2 Bos. & Pul. 59; 8 Taunt. 838.

(e) *Edwards v. Harben*, 2 T. R. 587; *Gross v. Neale*, 5 Moore, 10, where see form of a deed with such prospective rights to take possession.

(f) 2 Simons, 257, 570, and cases there cited; 3 Russ. R. 1, 12, 13.

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wise, at least in case of the bankruptcy of the transferor, his assignees will be entitled to the property; (*g*) and the same doctrine applies to the assignment of a *post obit* bond, or of a policy of insurance, of which notice should be immediately given to the insurer. (*h*) A voluntary settlement or assignment of *personal* property, made by a person who was *not* indebted at the time, is valid and sufficient against a subsequent purchaser for valuable consideration. (*i*)

By Contract. Tenthly. Title by *Contract* being by far the most important of all the means of acquiring a title to or interest in personalty, will be presently distinctly considered.

By Bankruptcy. Eleventhly. Title by *Bankruptcy* is now simplified and founded on two explicit modern acts. (*k*)

By Insolvent Act. Twelfthly. The Rights of the Assignee of an *Insolvent Debtor* and his Creditors, are also declared by recent acts. (*l*)

By Administration. Thirteenthly. Title by *Administration* has been treated as a mode by which a right to personal property may be acquired, first by the administrator, and after he has paid all debts of the intestate, and the duty equal to the legacy duty, then by his delivering the same, not (as in the case of *real* property) to the *heir*, but to the *next of kin*, in pursuance of the statute of distributions, 22 & 23 Car. 2, c. 10, explained by 29 Car. 2, c. 30, and in the following order :—

A Table showing how the Personal Estate of an Intestate is to be distributed. (*n*)

If intestate dies, leaving	His personal representatives shall take in proportions following:
Wife and child, or children,	One-third to wife, rest to child or children; and if children are dead, then to their representatives, (that is, their lineal descendants,) except such child or children, not heirs at law, who had estate by settlement of intestate, in his lifetime, equal to other shares.
Wife only,	Half to wife, rest to next of kin in equal degree to intestate, or their legal representatives.
No wife or child,	All to next of kin and their legal representatives.

(*g*) *Ante*, 107, n. (*f*).

(*h*) *Id.* *ibid.*

(*i*) 1 Sim. & Stu. 315.

(*k*) 6 Geo. 4, c. 16; 1 & 2 W. 4, c. 56.

(*l*) 7 Geo. 4, c. 57; 1 Will. 4, c. 38. As to what is *personalty*, 3 Russ. R. 376.

(*m*) As to the *administration bond*, see 8 B. & Ctes. 151; 2 Man. & Ry. 136, 3 C. Chit. Col. Stat. 324, 325, in notes.

(*n*) See Bridgman's Index, and Chitty, E. Eq. Dig. tit. Distribution, 319, 320, where see the cases as to the course of distribution collected; see also 2 Bla. Com. 315, 516, and Toller's Executor, 6th ed. 80 to 94, 369 to 403; *Id.* Index, 564,

565. In general, *administration* is to be granted in the same order, viz. to the person next of kin, *Id.* *ibid.*, and see Table, *Id.* 90. Where there are several next of kin in the same degree, the ordinary may grant administration to all, or to any one or more he pleases, 2 Bla. C. 504; Toller, 85; 1 Stra. 552; 1 Salk. 36. But the claim of administration by the party or parties entitled is so usual a claim of right, that a *mandamus* issues from K. B. in favour of the party entitled to enforce it, 8 East, 408. Administration may be granted to a *partner* if next of kin decline, 2 Sim. & Stu. 127.

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If intestate dies, leaving	His personal representatives shall take in proportions following:
Child, children, or representatives of them,	All to him, her, or them.
Children by two wives,	Equally to all.
If no child, children, or representatives of them,	All to next of kin in equal degree to intestate.
Child and grandchild,	Half to child, half to grandchild, who takes by representation.
Husband,	Whole to him.
Father, and brother, or sister,	Whole to father.
Mother, and brother, or sister,	Whole to them equally.
Wife, mother, brothers, sisters, and nieces,	Half to wife, residue to mother brothers sisters and nieces.
Wife, mother, nephews, and nieces,	Two-fourths to wife, one-fourth to mother, and other fourth to nephews and nieces.
Wife, brothers or sisters, and mother,	Half to wife, (under statute of Car. 2,) half to brothers or sisters, and mother.
Mother only,	Whole, (it being then out of statute of 2 Jac. 2, c. 17.) (m)
Wife and mother,	Half to wife, half to mother.
Brother or sister of whole blood, and brother or sister of half blood,	Equally to both.
Posthumous brother or sister, and mother,	Equally to both.
Posthumous brother or sister, and brother or sister born in lifetime of father,	Equally to both.
Father's father and mother's mother,	Equally to both.
Uncle or aunt's children, and brother or sister's grandchildren,	Equally to all.
Grandmother, uncle, or aunt,	All to grandmother.
Two aunts, nephew, and niece,	Equally to all.
Uncle, and deceased uncle's child,	All to uncle.
Uncle by mother's side, and deceased uncle or aunt's child,	All to uncle.
Nephew by brother, and nephew by half sister,	Equally per capita. (n)
Brother or sister's nephews or nieces,	Whole, nephews and nieces taking per stirpes, (o) and not per capita.
Nephew by deceased brother, and nephews and nieces by deceased sister,	Each an equal share, per capita, and not per stirpes.
Brother and grandfather,	Whole to brother.
Brother's grandson, and brother or sister's daughter,	To daughter. (p)
Brother and two aunts,	To brother
Father and wife,	Half to father, half to wife.

It will be observed that this statute secures as just a distribution of the personal assets as under *ordinary* circumstances would probably be directed by the most deliberate will, and in general the word "*relations*" in a testament will be

(m) By statute 1 Jac. 2, c. 17, s. 7, if after death of father any of his children shall die intestate, without wife or children, in lifetime of mother, every brother and sister, and representatives of them, shall have an equal share with mother.

(n) *Per capita*, is where all claimants claim in their own right, as in equal degree of kindred, and not *jure representationis*; as if the next of kin be intestate's three brothers, A. B. and C.; here his effects are divided into three equal portions, and distributed *per capita*, one to each. 2 Bla. Com. 517.

(o) When persons take by representa-

tion, it is called succession *in stirpes*; as if A. dies, leaving three children, B. leaving two, and C., brother of A. and B., surviving; then one-third to A.'s three children, one-third to B.'s two children, and remaining third to C., the surviving brother. 2 Bla. Com. 517.

(p) If grandson's father survived the intestate, but died before distribution made, then his son becomes entitled in distribution with sister's daughter to a moiety, but not otherwise, because son becomes representative of his father, it being vested interest in him, but he must take out administration.

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construed by reference to the statute of distributions. (*n*) Hence, unless a party wish to *prefer* one or more particular relations, or other persons, so as to *alter* the ordinary course of distribution, any great solicitude to make a will is unnecessary.

The mere circumstance of an administrator having been in possession of and used goods of the intestate for three months after the death, is not sufficient to change the property, so as to subject the goods to seizure for the private debt of the administrator, and therefore if taken under an execution against him, he, in the character of administrator, may support an action of trespass for seizing such goods. (*o*) No action lies for a distributive share. (*p*)

By Will or Testament.

Fourteenthly, Title by *Testament*. Here there is a leading distinction between a devise of land and a will or testament of personal property. In the case of *real* property of freehold tenure, the testator must in general not only have his estate or interest therein at the time of making his will, but he must also continue to have the same interest in the same estate until his death, and after-purchased lands, or even the same lands, if he materially change his interest therein, will not pass to the devisee, but will descend to the heir, unless he afterwards republish his will; whereas, as respects personalty, the will is *ambulatory*, and property purchased or vested in the testator after making such will, passes to the legatee, if the testator's intention to that effect can be collected from the will, and there will be no ademption of the legacy unless the intention was clearly to *revoke*; as, if at the date of a will the testator have certain stock in the funds, and bequeath it to A., and afterwards sell out the stock, but subsequently re-purchase the like or similar stock, the last may pass to A. as a substitution of the original stock, without re-publishing the will; (*q*) but then the will must be so framed as to import such intention; for where A. being married to B. bequeathed a legacy to "my beloved wife," and B. afterwards died, and A. married C., it was held that the latter was not entitled to the bequest. (*r*) Another distinction is, that a will of lands and tenements, not copyhold, must, by express enactment, be signed by the testator, and must have three attesting witnesses; (*s*) whereas a testament of personalty does not require signature or any witness; (*t*) and even written instructions

(*n*) *Brandon v. Brandon*, 3 Swan. 319; 207; 1 Russ. & M. 629.
and see 1 T. R. 161, and as to meaning of term *relation*. (*r*) 1 Russ. & M. 629.

(*o*) 2 Mood. & Mal. 132.

(*p*) 7 B. & Cres. 542.

(*q*) Cas. temp. Talb. 226; 2 Jac. & W.

(*s*) 29 Car. 2, c. 3, s. 5.

(*t*) Gilb. R. 260; Comyns, 452; 2 Phil. Ec. C. 213; 2 Bla. C. 501, 502. As to Stock, *ante*, 96, note (*p*).

taken down by an attorney from the deceased's dictation and not signed by him, but of which he approved, is a sufficient will; (u) and where the testator wrote a paper as his will, but left it incomplete for want of signature and attestation, which requisites it was proved he intended up to the time of his death to add, but was prevented from effecting by the act of God, such paper was established as a will; (v) and even alterations in pencil on a regularly executed and attested will have been admitted to probate. (x) As any paper written by a party or by his directions might operate as his will, unless qualified by some expression, the prudent course, in case of a mere *projected* will, which a person may wish to have by him ready for slight alteration or for signature at any instant, would be to adopt the form recently used by a late very learned Chief Justice, viz. "This paper is *intended* to become and contains the last will and testament of me, A. B., of, &c. *so soon as I shall have signed the same, but not sooner.*" I desire, &c. Then stating the particular directions and bequests as in a perfect and complete will; and the conclusion of such intended will and attestation may be thus: "And I nominate the said E. F. and G. H., &c. executrix and executor of this my will. In witness whereof, I have hereunto set my name and subscribed this paper, this day of , A. D. , (leaving a blank for the signature of the testator's name), and with the following already written attestation. Signed, published, and declared by the said A. B. as and for his last will and testament, in the presence of us, who, in his presence and at his request, have set our names as witnesses hereunto." (y) And when the testator had perfected his will by his signature, three witnesses wrote their names and additions at the bottom of the attestation. It must, however, be remembered that the completion of such a projected will may be prevented by accident or sudden death, and therefore when it is the intention of a party to dispose of his property to persons materially different to the distribution in case of intestacy, the only certain course is actually and completely to execute a concise and explicit short will, and to have another intended will more in detail ready to be executed, if circumstances will allow.

A will of personalty may be valid in part, though obtained by fraud as to the residue, (z) and the bequest of a legacy to a

(u) 2 Phil. Ec. C. 177.

(v) 1 Phil. Ec. C. 12, 58, 59.

(x) 2 Phil. Ec. C. 173; 1 Phil. Ec. C. 22; see further 2 Bla. C. 502, note 16.

(y) See the will of the late Lord Ten-

terden at Registry of the Prerogative Court of Canterbury, proved at London 21 Nov. 1832.

(z) 1 Dow. Rep. New S. 85.

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witness of a will of personalty is not, as in the case of a devise of land, invalid. (a)

Courts of Equity have a concurrent jurisdiction with the Ecclesiastical Courts with respect to wills and intestacy as regards personalty; (b) and therefore in general, in the construction of wills of personal estate, Courts of Equity follow the rule of the canon, which is founded on the civil law, and by the canon law the word "*goods*," and equally the word "*chattels*," taken simply and without qualification, comprise the whole personal estate of every description. (c)

If certain personal chattels be specifically bequeathed, and the meaning of the description be doubtful, parol evidence of scientific persons is admissible to explain the meaning. (d) Under the bequest of a leasehold farm, farming utensils not named will not pass, (e) though we have seen that it is otherwise as to growing crops of corn. (f) No action lies for a legacy, unless upon a promise or new consideration. (g)

Sixthly, *Contracts*, (h) or how a right in a chose in action may be acquired.

Contracts, we have seen, have been treated as one of the several modes of *acquiring or losing the right to personal things*. But that is too limited a view of contracts. (i) We cannot in this summary consider all the points relating to contracts and every kind of contract. We shall only notice a few *general* rules and some of the principal contracts, with occasional suggestions.

1. General division into contracts of record, specialties, and simple or parol contracts.

Contracts are progressively from a higher to an inferior *nature*, and on that account are entitled to relative preferences in the administration of assets. They are of *Record*, *Deeds* under *Seal*, or *Simple* Contracts, whether in writing or verbal.

Those of *Record* are *Recognizances* and *Judgments* acknowledged or recovered before a judge or other official person. (j)

Deeds and other instruments under seal stand next in order. These are principally money bonds in a *penalty* (k) conditioned for the payment of money, or bonds to replace stock, mortgage

(a) 25 Geo. 2, c. 6; 3 Simons, 4; 3 Russ. & R. 436.

(b) 4 Russ. R. 370; 1 Ves. 334; 1 Cox, 342; 2 Atk. 116; *aliter*, in case of a devise of real estate to pay debts, 9 Bar. & Cres. 489.

(c) 4 Russ. R. 370, where see the effect of different words in a will as regards the description of the personal things bequeathed; and see *ante*, 96, 97, when stock passes by a bequest; see further *ante*, 100, 101, as to the construction of a will.

(d) 3 Simons, 21, *ante*, 101.

(e) 11 Ves. 637.

(f) *Ante*, 92.

(g) 7 B. & Cres. 542; but see 3 East, 120; 1 M. & P. 209, 215.

(h) See *post*, chap. ix., what contracts will be enforced in equity.

(i) *Ante*, 99 n. (p); 2 Bla. C. 400, 442. It is strictly so in a contract of *sale*, and in all cases of contract one party or the other, by virtue of the engagement, is entitled either to receive money or goods, or have some act performed or omitted; but contracts are by no means limited to the *transfer* of an interest in a personal thing, and therefore, and also in respect of their general importance, they deserve more particular attention.

(j) As to the precaution in docketing, see 3 Simon's R. 301, *ante*, 104.

(k) In equity more than the penalty may be recovered, 3 Simon's R. 129, 340.

bonds, annuity bonds, bail bonds, replevin bonds, or bonds conditioned for the performance of covenants in another indenture, or for performance of any other act; *Mortgage Deeds, Annuity Deeds, Leases under Seal, Indentures of Apprenticeship, Charter-parties, Policies under Seal*, whether insuring life, or houses, or ships, *Articles of Agreement*, and *Deeds Poll*. It is obvious that every contract that can be entered into by simple writing or by parol (excepting, perhaps, bills of exchange and promissory notes) may, if the parties think fit, be under seal, and when so, they have the properties and privileges of specialties; but in that case, in general the formal parts of the instrument differ from the terms of the instrument when not under seal.

Lastly, are *Written Contracts not under Seal*, or mere *Verbal Promises*. These are of infinite variety. The principal are bills of exchange, promissory notes, checks on bankers, policies of insurance not under seal, insuring ships or lives, (l) memorandums of charter, wagers, awards, contracts relating to the loan of money, or relating to the sale, exchange, or use of goods or land, warranties, guarantees, contracts to marry, to serve, or employ, or perform works, or to deliver or accept goods sold or bought, or to indemnify; contracts, express or implied, of *bailees*, or *agents, factors, wharfingers, farriers, carriers* by land or water, and of *Attorneys*; and in short all the various bargains, express or implied, which are not usually under seal.

In the case of contracts under seal, no consideration is essential to their validity, unless fraud or illegality can be proved; they are binding upon the party himself, though inoperative against creditors or purchasers, although he received no consideration. Hence, in all cases where the consideration may be doubtful or difficult to state or to prove, or where there is a considerable debt to be guaranteed, it is preferable to have the engagement under seal; and in that case, if the contract itself be clearly expressed, recitals stating the motive for entering into it are in general unnecessary, though, as even a Court of Equity will not enter into the consideration of the motives inducing a party to enter into a contract, unless it be expressed therein or in recitals, (m) it may frequently be advisable, as well in deeds as in other contracts, fully to recite such motives, as explanatory of the object and spirit of the subsequent stipula-

2. Consideration when essential.

(l) An insurance on party's own life becomes void if he be executed for a felony, *Volc v. Bolland and others*, 2

Dow. R. New S. 1. over-ruling *Bolland v. Disney*, 3 Russ. R. 351.

(m) 1 Jac. & W. 423.

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tions. (n) But with respect to *contracts not under seal*, technically termed *parol*, (though in writing), they can never be enforced unless founded upon sufficient *consideration*, unless, indeed, in the case of bills of exchange and promissory notes, and then only when in the hands of a *bonâ fide* holder for value. (o) In all other cases of *parol* or simple contracts, the party suing must prove *affirmatively* that there was adequate consideration, and the defendant is at liberty to show that there was none, or that it was illegal. (p) However valid the expressed consideration may be, it is always competent, in the case of a *deed*, though not so of a *record*, for the parties to it to plead and prove that the whole or part of the true consideration was *illegal*. (q)

3. The peculiar
use of records
or deeds. (r)

The principal utility in having the contract for *debts* of record or under seal, is to bind the heir and devisee of the contracting party at law; and though a modern act (s) now subjects the real estate of a *trader*, within the meaning of the bankrupt law, to the payment of simple contract debts as well as specialties, that enactment does not extend to persons who are not such traders, and consequently it is in general still advisable to secure a debt or performance of other contract by *deed* expressly binding the heir, and also to have a judgment docketed, so as to bind the land even in the hands of a purchaser as well as the heir and devisee. Another and very important distinction is, that debts of record, when duly docketed (t) and due on specialty, are to be preferred at law in payment of debts out of personal property by an executor or administrator; so that, upon the whole, in all cases of considerable demands, it is still advisable to have the security of a deed. In case of a bond in a penalty, in a Court of Equity more may be recovered than the amount of the property, though it is otherwise at law. (u)

4. Proposals for
a contract, when
binding.

It is a general rule, that to constitute a complete valid contract not under seal, there must be at least two contracting parties, and each should be reciprocally bound at the *same*

(n) 1 Jac. & W. 422; and see 1 Turner & R. 41, 54, as to *recitals*.

(o) *Ridout v. Bristow*, 1 Tyrw. R. 84; 1 Crompt. & J. 231, S. C., where see lucid remarks of Mr. Baron Bayley.

(p) *Id. ibid.*

(q) 1 Saund. 295; 2 Wils. 347; 3 T. R. 424, 538; 9 Bar. & Cres. 462; 10 B. &

(r) See more fully as to the leading distinctions between records, specialties, and simple contracts, 3 Chit. Commercial Law, 3 to 11; and as to judgments, 3 Younge & Jerv. 101.

(s) 1 W. 4, c. 47.

(t) *Ante*, 104.

(u) 3 Russ. R. 598.

time. (v) Therefore, upon a sale by auction, if a party bid for an article a named sum, he is not bound by his offer till the auctioneer on behalf of the vendor has testified his acceptance of the offer by knocking down his hammer, until which instant the bidding may be withdrawn. (x) But that doctrine does not apply to proposals made by letter from one party to another at a distance from each other, to purchase any commodity on certain named terms. In such a case, it has been held that the party is bound by his proposal until either the specified time or a reasonable time for answering it has elapsed, and if within that time the proposal be accepted, it is binding, for otherwise no bargain between parties at a distance from each other could well be effected. (y) But if the proposer, before the other party has forwarded his assent, rescind his offer, by sending a special messenger or otherwise, it seems he might effectually do so. (z) If the party receiving the proposal should not entirely acquiesce, but propose *new terms* by letter, then he in his turn would be bound by his proposal until a reasonable time had elapsed for receiving an answer; but in the mean time the original proposer would not be bound by his first proposition, and so on until there has been a complete assent on one side to the last proposition of the other. (a) But a mere *proposal* in writing to become responsible for the debt of another is not binding, unless the creditor immediately communicate his assent thereto to the proposer. (b)

But the rule that both parties must reciprocally be bound by the bargain, does not either at law or in equity extend to *formal signatures* required by the statute against frauds, provided the paper signed by the party sued express the name of the other party. (c) Therefore a party who has not signed may sue the other party who has, (d) and a Court of Equity will also decree a specific performance against a party who has signed; (e) one reason may be, that the statute in one section only requires that the party to be charged shall sign, but another section is in the plural. (f) But still it has been doubted whether in these cases the party who signed is not at liberty to recede,

(v) 2 Moore & P. 86; 5 Bing. 34.

(x) *Payne v. Cave*, 3 T. R. 149.

(y) 16 East, 45; 1 M. & S. 21; 1 Bar. & Ald. 681; 4 Bing. 658, which seems to overrule 3 T. R. 653.

(z) 4 Bing. 653.

(a) *Semble*; and see 4 Wils. & Shaw, 20; 4 Bing. 653.

(b) 1 Stark. 10; 1 M. & S. 557; and *quære* if such assent must not be in

writing, 1 Russ. & M. 394.

(c) 1 New R. 252.

(d) 6 East, 307; 2 Smith's R. 389; 3 Taunt. 169; 5 Taunt. 788.

(e) 1 Russ. & M. 391, 394, 625; 2 Jac. & W. 426; 2 Ch. C. 164; 7 Ves. 265.

(f) 29 Car. 2, c. 3, s. 4, 17; see the reason assigned by the court, 5 Taunt. 788.

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until the other party, who has not signed, has done some act to bind himself, such as commencing an action or filing his bill; (g) and where merely a proposal, and not an express undertaking has been offered, it has been considered that it must be *accepted in writing*; but that when there is a positive undertaking, then such written acceptance is not essential. (h)

5. When contract must be in writing, and signed.

With respect to contracts not under seal, the *common law* makes no difference, whether they be in writing or verbal, excepting bills of exchange and promissory notes, which must be in writing or pencil. Nor does the common law require the consideration to be stated on the face of the contract when in writing, but allows it to be supplied by verbal evidence. The exceptions introduced by statute principally relate to contracts by executors, and by third persons for the debt of another, or relating to the sale of an interest in land, or which are not to be performed within a year, and contracts for the sale of goods, wares, or merchandize for the price of ten pounds or upwards; (i) and a recent act requires acknowledgements (excepting by *payments*), to take a case out of the statute of limitations, and contracts of sale of goods to be made and delivered at a future time, to be in writing. (k) And independently of these statutes, it is always advisable, with a view to certainty in evidence, to have all the material representations, considerations, and circumstances connected with the contract, and especially the contract itself, fully and formally stated in writing, and signed by all the parties intended to be liable to perform it. Thus, unless *verbal representations* before or at the time of sale, or other transaction, be expressly made part of the written contract, they will not (however material, and however they may have misled the

(g) 2 Jac. & W. 426.

(h) *Palmer v. Scott*, 1 Russ. & M. 394.

(i) 29 Car. 2, c. 3, s. 4. "And be it further enacted by the authority aforesaid, that from and after the said 24th day of June, no action shall be brought whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some me-

morandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. Section 17. And be it further enacted by the authority aforesaid, that from and after the said 24th day of June, no contract for the sale of any goods, wares, and merchandizes, for the price of 10*l.* sterling or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.

(k) 9 Geo. 4, c. 14.

contracting party) be considered as part of the contract, so as to enable him, upon discovering the deceit, to avoid the contract; and at most he could only sue in a cross action to recover compensation for the fraudulent misrepresentation, as Lord Ellenborough expressed, laying asleep his prudence. (*l*) It has however been held, that statements in *printed* papers, and words relative to a ship, are in general an assurance or warranty to the merchant who loads goods on board the ship in pursuance of the advertisement, and became part of the contract, although they be not afterwards contained in the bill of lading or charter-party not under seal. (*m*) So with respect to the sale of an estate; an advertisement in the newspaper misdescribing it may become part of the contract, or at least subject the vendor to an action for deceit. (*n*) When, as in cases within the statute against frauds, it is required that the contract shall be *signed* by the *party* or *parties* to be charged therewith, it is a sufficient *signature*, if the party himself write his name any where, even in the commencement, with intention to give effect to the whole; (*o*) as, "Mr. Wilmot has agreed on," &c.; and though there be only the signature of the party sued to an *express* undertaking, and not of both parties, that suffices; though it would be otherwise if there was merely a signed proposal; (*p*) but unless the signature apply to the *whole* of the stipulations, it is insufficient. (*q*) If a bill, filed for specific performance, state that the agreement was in writing, signatures will, on demurrer, be presumed, though it is advisable to state that it was signed; (*r*) and the same doctrine prevails at law in a declaration on an agreement. (*s*) The memorandum signed must contain *all* the substantial parts of the bargain, leaving nothing in that respect to be supplied by parol evidence. (*t*)

If in the particular cases enumerated by the statute against frauds, the contract be not properly in writing, and signed when requisite, although it may be capable of proof by one hundred witnesses, or by the same number of verbal admissions, it cannot be enforced either at law or in equity, with this exception, that in a Court of Equity, although a contract of sale be wholly verbal, yet if by its terms it was expressly stipulated that it should *be duly reduced into writing* and signed, and that formal

6. When equity will aid want of a written contract in cases of fraud.

(*l*) *Powell v. Edmunds*, 12 East, 6. *

(*m*) *Abbott on Shipping*, 4 ed. 224; *Holt on Shipping*, 57; 4 Campb. 243.

(*n*) *Kuapp's R.* 344; 1 *Simon's R.* 13; 3 *Id.* 29.

(*o*) *Prossert v. Parker*, 1 *Russ. & M.* 625; *Sugd. V. & P.* 8 ed.; and cases, *Chit. Col. St.* 574, 375, notes (*p*), (*q*), (*r*).

(*p*) *Palmer v. Scott*, *post*, 1 *Russ. & M.* 391; *ante*, 116.

(*q*) *Id.* *ibid.*; 3 *Meriv.* 53, 62.

(*r*) 1 *Sim. & Stu.* 543.

(*s*) 1 *Saund. R.* 276, n. (*a*); 7 *T. R.* 351; 2 *Brod. & B.* 262.

(*t*) See note (*c*), *post*, 125.

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completion of the bargain was *prevented by fraud of the party who ought to have signed*, then a Court of Equity would enforce the verbal agreement against such a party. (u)

7. When contract may be collected from several documents or letters.

The *whole* terms of the contract, when in writing, need not be expressed on the *same* paper or document, but may be collected from *several letters* containing proposals and ultimate agreements between the parties, (v) but then the last communication must be a distinct and unqualified assent to an equally clear proposal; and if the last letter suggest any new or further proposition requiring the assent of the other party, or some communication from him to complete the transaction, then no contract or agreement is constituted. (x) So under the statute against frauds requiring a written and signed agreement, it has been held that a sufficient contract may be constituted by a letter ascertaining the terms of the agreement, by reference to another document containing them, (y) even though such document has not been signed, (z) or referring to something which is in itself certain, as to the custom of the country in an agreement for a lease; (a) though under the statute against frauds it has been held that *parol* evidence cannot be received to ascertain what is referred to, the subject of the reference not being sufficiently certain or decided and distinct upon the face of the document itself. (b)

8. All proper terms must be expressly specified.

There is one general rule and precaution to be observed in framing or entering into all express contracts whether or not under seal, namely, that all the proposed terms of bargain, and all proper stipulations, be expressly inserted in the written contract; for though there are some cases in which a Court of Law or Equity will *imply* or infer a contract in all proper terms, when the parties themselves have not fixed the terms of contract, yet when they do contract for themselves, no term or stipulation not expressed will be superadded by the court, though the court might readily conjecture what the parties intended, or what would be reasonable; for courts are to *construe*, and not to *make* new contracts for parties which they have omitted to

(u) 2 Bro. C. C. 565; Sugd. V. & P. 106, 107; and see 3 Russ. R. 424; but see 3 Bar. & Ald. 326; 1 Cox, 219; 1 P. Wms. 770; 3 Meriv. 53, 62.

(v) 1 Bing. 9; 7 Moore, 219; 4 Wils. & Sh. 20; 1 Sim. & Stu. 194; 3 Taunt. 169.

(x) *Holland v. Eyre*, 4 Wils. & Shaw, 20; 1 Sim. & Stu. 194; 4 Bing. 653.

(y) 3 Atk. 502; 2 Bos. & P. 238.

(z) 3 Bro. C. C. 318.

(a) 1 Ves. J. 330.

(b) 1 Ves. J. 326; 5 Bar. & Cres. 583; and 9 Bar. & Cres. 561, 569, 570.

make for themselves. (c) Therefore when several parties entered into a written engagement of partnership in a foreign adventure, and one of them was to proceed and reside abroad, and to undertake much more risk and personal trouble than the others, and there were written stipulations for divisions of profits, but no stipulations providing remuneration for this extra trouble, or for the contingency of the undertaking not proceeding; and the party went abroad at great expense and trouble, and commenced the adventure, but which was shortly afterwards put an end to, and he proceeded in Scotland against his copartners to recover remuneration for his extra trouble and expense, it was held in the House of Lords, reversing the decision of the Lord Ordinary, that as the contract did not provide for the event, there was no jurisdiction to afford him any compensation. (d) So if a contract of partnership be silent as to the division of profits, then whatever may have been the unexpressed intention of the parties, each will be entitled to an equal moiety, though one of them brought in no part, or a very unequal share of the capital. (e) And in another case in the House of Lords it was on the same principle held (reversing the judgment of the Court of Session) that a clause in articles and conditions regulating the management of a farm, that "the whole fodder to be used upon the ground, and none sold or carried away at any time, hay only excepted, and all the dung to be laid on the farm the last year of the lease," created an effectual prohibition against the tenant disposing or carrying off the farm any part of the straw of the waygoing crops, and that as there was no stipulation on the part of the landlord to pay the value, the tenant could not recover it; (f) and though the custom or usage of the county where a farm is situate would otherwise entitle the tenant to remuneration for his waygoing crops, or for labour or manure from his landlord or incoming tenant, (g) yet if there were any express stipulation between the outgoing tenant and his landlord inconsistent with such custom or usage, then the latter will not prevail. (h) So though a tenant is in general entitled during his term to remove any annexations made by him to the

(c) See explicit cases in the House of Lords, *Campbell v. Beath*, 2 Wils. & Shaw, 37; and *Gordon v. Robertson*, 2 Wils. & Shaw, 115; and *Watson v. Duke of Wellington*, 1 Russ. & M. 602, 605; as to contingencies, 8 Bing. 231.

(d) *Campbell v. Beath*, 2 Wils. & Shaw, 37.

(e) *Peacock v. Peacock*, 16 Ves. J.; *Struthers v. Burt*, 2 Wils. & Shaw, 153.

(f) *Gordon v. Robertson*, 2 Wils. & Shaw, 115; *Allen v. Berry*, 3 Wils. & Shaw, 417, *quære*; 7 Bing. 465.

(g) *Dally v. Hirst*, 3 J. B. Moore, 536; 1 Brod. & B. 224; *Holt's C. N. P.* 197; 7 Bing. 465.

(h) 16 East, 71; 1 Taunt. 19; 1 Meriv. 15; 2 Bar. & Ald. 716; *Holt's Cases*, Ni. Pri. 197; 3 J. B. Moore, 536; 8 Bing. 65.

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freehold for the purposes of *trade*, yet if he has covenanted to leave all *erections* or *improvements*, it is otherwise, and he is not in that case entitled to any compensation. *(i)* So, although in a tenant's covenant to repair, damages, by fire be excepted, and which protects him from liability to repair, yet, unless expressly stipulated otherwise, he will continue liable to pay rent to the end of his term, and he cannot even compel the landlord, unless perhaps when the buildings are within the bills of mortality, to expend, in rebuilding, the money he has received for the loss from an insurance office; *(k)* and therefore care should be observed on the part of a lessee to insert a proviso suspending liability to payment, or at least the tenant should effect an insurance sufficient to cover the amount of the rent and loss of the value of the occupation during the residue of the term.

There are however *some* cases of express written contracts, when, if such contract be wholly silent on the subject, *implied* terms of contract may be *superadded*, provided they are not inconsistent with the express stipulation. Thus a custom or usage that tenants shall have the waygoing crops after the expiration of their lease, or be paid for fallows, seeds, or manure, is valid and effectual, if the lease be silent on the subject. *(l)*

9. Time of performance when the essence of contract.

So, if either party to a contract wish to make performance at a *precise time* material, he should introduce an express and positive proviso to that effect, for otherwise, at least as respects the sale of real property, performance on the very day is not in general considered in a Court of Equity as of the essence of the contract. *(m)* But that rule, it is said, is not to be extended; *(n)* and where a day was fixed in a contract of sale of the good-will of a public house and the stock in trade and furniture, at a valuation, and the purchaser was not ready till the next day, when he tendered the amount, the time was held the essence of the bargain, and a Court of Equity refused a specific performance at the instance of such purchaser, though he was only one day too late. *(o)* And where a purchase is intended with a view to commercial purposes, and not merely as an investment of money, time is frequently considered as the essence of the contract. *(p)* And where a

(i) 1 Taunt. 19; 9 Bing. 24.

(k) 1 Simons' R. 146; 5 Bar. & Ald. 1.

(l) 1 Hen. Bl. 5; Doug. 201; Holt's C. N. P. 197; 3 J. B. Moore, 536; and see note, *supra*; 7 Bing. 463.

(m) In equity a vendor's undertaking to give an abstract and deliver possession by a particular time, does not make such

time the essence of the contract, 1 Jac. & W. 422; 1 Russ. R. 376; Sugd. V. & P. 364 to 383.

(n) 2 Jac. & W. 288, 289; and Sugd. V. & P. 8 ed. 363.

(o) 1 Russ. Rep. 376.

(p) 1 Sim. & Stu. 190.

debtor is to be excused from paying the whole debt, provided he pay certain instalments as part, on named days, and he neglect to make punctual payment, the creditor becomes, even in equity, entitled to sue for the whole debt. In a case *at law*, four days' delay in performing an act, though occasioned by bad weather, was held to deprive the party of his right to 80*l.*, which was to be paid if the act had been done on a fixed day. (q) And *at law* the precise day fixed for completing the sale, or other contract, is, in general, material; and if either party be not *then* ready, the other may immediately treat the contract as no longer binding, and may sue for the breach, provided he himself was ready to perform his part. (r) In the case of a sale of goods, if the purchaser do not fetch away and pay for them at the appointed day, it has been considered that the vendor must give him notice, and allow him a further reasonable time, before he can re-sell; (s) but it seems the sounder doctrine, that at law this is not necessary. (t) But in these cases the party must notify to the other his intention to insist on precise, punctual performance, and if he omit to do so, he cannot retain a deposit. (u)

If the contract be with several persons, it should be expressly stipulated that each shall be *severally* as well as *jointly* bound to perform the contract; for if there be no express stipulation to that effect, the contract will be considered as only joint; and in case of death of one, there will be no remedy *at law* against his personal representative; and though the estate of a deceased partner or principal is chargeable in equity, that remedy is not so perfect or speedy as at law; and if the contract were joint only, relief will not in all cases be afforded in equity against the estate of a deceased *surety*. This distinction is so important, that where the parties have intended that a security shall be joint and several, but by *mistake* has been only joint, a Court of Equity will compel a surety to sign a joint and several security, according to the original intention. (v)

So if the debt or contract be of considerable importance, it may be advisable to obtain *several* warrants of attorney for security in a large penalty, so as certainly to exceed the principal debt and a great arrear of interest and expenses, (x) so as to enable the

(q) 4 Car. & P. 295; and see 4 Bing. & Cres. 575; Sugd. V. & P. 362. 280.

(r) Sugd. V. & P. 8 ed. 359 to 370.

(s) 1 Salk. 113; but see 3 Campb. 426, 1 Marsh. R. 514.

(t) 4 Taunt. 334; 1 Marsh. 514; 8 B.

(u) 8 Bar. & Cres. 575.

(v) *Rawstone v. Parr*, 3 Russ. Rep. 424.

(x) Why in a penalty, see 3 Sim. R. 299.

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creditor to issue several executions at the same time into different counties against different descriptions of property, which might otherwise be taken by several creditors pending the loss of time when waiting the return of a partial levy upon one writ before any further execution could issue.

So as our English law (which in that respect is defective, and not so just as the Scotch law,) rarely allows *interest* on unpaid debts, unless expressly stipulated for, care should be observed to provide for interest from stipulated periods, and even upon sums that the complainant might have to pay in the shape of damages. (y) A stipulation as to interest is particularly advisable in contracts, whether by auction or private, for the sale of property; (z) and a vendor who desires to avoid being required to carry evidence of his title beyond a certain time or deed, must so expressly stipulate in the particulars and conditions of sale; and when he sells only part of his estate, and wishes to avoid covenanting to produce his title deeds when required, he must also stipulate accordingly, or otherwise he may be compelled so to covenant. (a) In cases of *liens*, the law, in the absence of express stipulation, does not in general allow the party holding it to *sell* the thing deposited, although it may be of a perishable nature; (b) in cases therefore of such a deposit, an express written power of sale should be provided.

From persons who are *traders*, if there be the remotest chance of bankruptcy, it is advisable to obtain an unqualified bill of exchange or promissory note for a sum certain, as a collateral security for the performance of the contract, though no way relating to the payment of money; because in the event of bankruptcy, the holder may prove or claim for the amount upon such bill or note, when the unliquidated damages for the breach of the contract could not be so proved; and this precaution should always be observed by *sureties* before they enter into their engagement.

10. Precautions
by sureties by
bond. (c)

Sureties for the fidelity of *clerks*, or any party in any situation, besides taking the best security they can obtain from the person for whose conduct they become responsible, should also stipulate in their bond or guarantee not only for a power to determine it, but also that the master or principal shall at certain times exact from the clerk due statements of account, and

(y) 9 Bar. & Cres. 380; 6 Bing. 380; 1 B. & Adolp. 577.

(z) 1 Sim. & Stu. 122; *Harrington v. Hoggart*, 1 Bar. & Adolp. 577.

(a) *Farn v. Ayers*, 2 Sim. & Stu. 535.

(b) *Holt's C. N. P.* 383.

(c) See *post*, guarantees not under seal, where several or joint.

shall himself carefully examine the same, and give notice of the least default or irregularity on the part of the clerk, and that otherwise the surety shall not be liable. (*d*) A surety by bond, unless he have a counter-bond to indemnify him, and which it is advisable to obtain, upon paying the principal obligee, is merely a simple contract creditor of the debtor; though, if there were a mortgage, he might, upon paying, obtain an assignment thereof as his own security. (*e*) He would not be discharged from liability in equity by the creditors taking a warrant of attorney, payable by instalments, if no additional time be given, or he were privy to the arrangement. (*f*) As between several sureties by the same bond, if one pay more than his just share, he has in general a right to contribution from the co-sureties; (*g*) but not so where sureties are bound by separate instruments for equal portions of a debt due from the same principal, and the suretyship of each is a separate and distinct transaction. (*h*)

If a contract be too uncertain in its terms to collect its certain meaning, and the statute of frauds preclude the admissibility of parol evidence to clear up the difficulty, (*i*) or the parol evidence will not supply the defect, then neither at law nor in equity can effect be given to it; (*k*) and though an agreement referring to a plan may be rendered perfect, if the identity of the plan intended to be referred to can be established; (*l*) yet if the latter be uncertain, even a court of equity will not decree specific performance. (*k*)

11. Necessary
certainty in con-
tracts.

If there have been a mistake in drawing up a formal written contract, it is advisable in general for the party prejudiced by the error to apply to a *Court of Equity* to reform the instrument, and which will, in proper cases, be enforced; (*l*) and this has been effected, although the party applying to the court was in the profession of the law, and himself drew the contract, it appearing clear that it was framed so as to admit of a construction inconsistent with the true agreement of the parties; (*m*) and even a surety may be compelled to give a joint and several promissory note according to the agreement of the parties, where by mistake a mere joint note had been given. (*n*) And where trustees have by mistake of facts agreed to sell an estate at a sum greatly under the real value, a Court of Equity will

12. Mistakes in
contracts, and
how reformed in
equity or aided
at law.

(*d*) *Ante*, 82, 83.

(*e*) 1 Turn. & R. 224.

(*f*) *Id.* 395; 2 Sim. R. 12, 155, 253.

(*g*) 2 Bos. & Pul. 268, 270; 1 J. B. Moore, 8.

(*h*) 1 Turn. & R. 426.

(*i*) 5 B. & Cres. 583; *post*, 125, note (*e*).

(*k*) 1 Russ. & M. 116.

(*l*) See in general chap. v. *post*.

(*m*) 1 Sim. & Stu. 210; 3 Russ. R. 424.

(*n*) 3 Russ. R. 424.

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not assist the purchaser upon a bill for specific performance, but will leave him to get what damages he can by action at law. (o) But a Court of Equity will reform a deed only where the intention of the parties has been mistaken by the drawer, and will not correct an error in an instrument occasioned by the ignorance of the parties in a matter of law. (p) Sometimes also the consequence of a mistake in drawing up a written contract may be aided *even at law*; as where a material word appeared to have been *omitted* in a lease by mistake, and other words therein could not have their proper effect unless the omitted word were introduced, it was held that such lease must be construed as if that word were inserted, although the particular passage where it ought to stand conveyed a sufficiently distinct meaning without it. (q) But if there be no patent ambiguity on the face of the instrument, nor improper conduct amounting to such fraud as to invalidate the contract, and the terms of the instrument be clear, though contrary to the real intention of the parties, no parol evidence is at law or in equity admissible to controul or contradict the written terms in any suit upon it; (r) and therefore the only course is to file a bill at the earliest instant to have the written contract reformed. (s)

So a conveyance which passes too much may be rectified, and the excess deducted; and it should seem that an issue may be directed with a view to correcting a mistake in a deed. (t) And where a deed affects by its recitals to carry an agreement into execution, and goes beyond such agreement, the Court will rectify it. (u) But a bill to rectify a conveyance alleged to have passed by mistake, and that more was included in a previous agreement, was dismissed, the conveyance reciting a more extended agreement, and the parties being dead, and the agent of the grantor having acknowledged the extended agreement, and the agent of the grantee, who could have given a personal account of the transaction, not having been examined by the plaintiff. (x) And in general great caution is observed by a Court of Equity in cutting down the effect of a formal conveyance. (y)

2. Particular
contracts.

It would be beyond the present undertaking to consider every contract in particular, and we have therefore only stated general rules. However, *contracts of sale* and of *guarantee* are of such general importance, that we will notice at least a few of the points respecting them.

(o) 1 Jac. & W. 74.

(p) *Cockerell v. Cholmely*, 1 Russ. & M. 418.

(q) *Wight v. Dickson*, 1 Dow, 141, 147.

(r) See cases collected and ably commented upon in Sugd. V. & P. 8 ed. 124

to 157.

(s) *Ante*, 123, notes (m), (n).

(t) 1 Turn. & R. 41.

(u) *Id.* 52.

(x) *Id.* 41.

(y) *Id.* 54.

With respect to contracts of *sale of "any goods, wares or merchandize*, for the price of ten pounds sterling," the statute against frauds, 29 Car. 2 chap. 3, (z) requires that "if the buyer shall *accept part* of the goods so sold, and *actually receive* the same, or give something in *earnest* to bind the bargain, or in part of payment, or that some *note or memorandum in writing* of the *bargain* be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized;" and that provision has been extended to all contracts for the *sale* of goods, notwithstanding the goods may be intended to be delivered at some future time, or may not, at the time of such contract, be actually made, procured, or provided, or fit or ready for delivery; or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but the memorandum need not be stamped. (a) When the contract is in writing, and there is a *warranty*, it is advisable to make it part of the written stipulation.

Although this clause in the statute against frauds does not require an agreement *formally* drawn up, but only a *note or memorandum* of the *bargain*, yet the term bargain here is equivalent to the word agreement in the fourth section of the act, (b) and, therefore, the note or memorandum must at least state the *price* for which the goods were sold, and the court will not allow the defect to be supplied by receiving evidence of a *quantum valebat*. (c) The real purchaser may, in general, be sued, although his agent were debited. (d)

A contract of sale of specific goods, complete at the time when paid for, immediately vests the property in the purchaser, and he may take the possession and is responsible for death or loss. (e) But when the contract might be satisfied by delivery of the stipulated quantity out of a *larger bulk*, and the purchased article has not been set apart, or when the vendor is to *make* an article for the purchaser and it is not finished, no property has vested in the purchaser, although he may have advanced the full price to the vendor, unless it has been expressly stipulated otherwise. (f) If the property has passed to the vendor then he may not only take it, but he might support detinue or trover for withholding it. (g)

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1. Precautions
in contracts of
sales.

(z) See decisions on the act, Chit. Col. Stat. tit. Frauds, p. 377 to 383.

(a) 9 Geo. 4, c. 14, s. 7, 8.

(b) *Egerton v. Matthews*, 6 East, 307.

(c) 5 Bar. & C. 583; 8 D. & R. 343; 9 B. & Cres. 561, 569, 570.

(d) 9 B. & Cres. 78, 449.

(e) *Shep. Touch*, 225; *Long on Per-*

sonal Property, 147, 148; 6 Bar. & Ald. 360.

(f) *Id. ibid.*; 1 Taunt. 318; 2 Campb. 240; 5 B. & Ald. 492; 2 Bos. & P. 584; Cowp. 294.

(g) *Id.*; Fitz. N. B. 138; Willes, 120; 1 Dyer, 24, n. (b.)

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If a *warranty* has turned out false the purchaser may *immediately* refuse to take the commodity, but he cannot return it after once accepting it, excepting where fraud, or express agreement to take back, can be proved. (h) But goods ordered generally, if unfit for the understood purpose, may be returned within a reasonable time. If the goods have been properly returned *immediately*, or, in the last case, within a *reasonable time*, then the purchaser may resist payment, (i) but otherwise not; (j) or in an action against him for the price the purchaser may *reduce* the damages or sum to be recovered, by proving the breach of the warranty, and the amount which in respect thereof ought to be deducted from the price; (k) or the purchaser may, in the case of an express warranty, pay the whole price, and bring a cross action of *assumpsit* for the breach of warranty; (k) or he may bring an action on the case for the fraud or deceit, (l) and which seems the proper action where there has been *fraud*, as concealment, without any express warranty. (m)

In case of a contract of purchase of *real* property, the purchaser is not bound to take or accept a conveyance of a part of one undivided share out of seven with compensation. (n)

2. Precautions
in regard to
guarantees.

Guarantees are a description of *simple* contract that very frequently becomes the subject of discussion and litigation, and in making them more care and precaution appear to be necessary than is usually observed. The statute against frauds, 29 Car. 2, c. 3, s. 4, enacts, "that no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate, or whereby to charge the defendant upon any special *promise* to answer for the debt, default, or miscarriage of another person, unless the *agreement* upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." The terms, "*promise*," and "*agreement*," in this act, do not extend to guarantees *under seal*, or to bills of exchange or promissory notes; (o) and, therefore, whenever the sum to be secured is considerable, it will be most advisable to require a guarantee under seal, or by bill or note, so as to avoid the questions

(h) 2 B. & Adolp. 456.

(i) 2 Taunt. 2.

(j) 2 Bar. & Adolp. 456.

(k) Id. *ibid.*; 2 East, 451.

(l) Dougl. 21; 2 Stark. R. 163; 2 East, 446; 4 Bing. 72; 5 Bar. & Cres.

605; 5 T. R. 142.

(m) 12 East, 11; 4 Campb. 22; 5 B. & Cres. 605; 5 T. R. 142.

(n) 3 Sim. R. 29; 1 Russ. & Myl. 29;

(o) 1 Tyr. Rep.

which so frequently arise upon the sufficiency of the statement of the consideration in common guarantees not under seal.

The guarantees must, at all events, be in *writing* and *signed*; further, it must be a *promise* or *agreement*; and a mere *proposal* to guarantee, unless the person to whom it is made communicate his acceptance, is not binding, (p) and it is said such acceptance may be by *parol*. (q)

Under the term "*agreement*," it is settled, that not only the *engagement* itself must be stated in writing, but also the *consideration* upon which it is founded, either expressly, or in terms from which it may be inferred. (r) Thus an engagement in these words, "Messrs. Wain and Co., I will engage to pay you by half-past four this day fifty-six pounds, and expenses, on bill that amount, on Hall, (Signed) Jno. Warlters, (and dated) No. 2, Cornhill, April 30, 1803," was held insufficient; (s) and where the engagement was, "Mr. W. will engage to pay the bill drawn by Pitman in favour of L. S." it was held invalid; (t) and the following letter, addressed by the defendant to the plaintiff, which the defendant dated and signed, was held insufficient— "To the amount of 100*l.*, consider me as security on I. C.'s account." (u) So where the defendants wrote thus, "Messrs. Boothey and Co. we hereby promise that your draft on W. C., due at Messrs. ———, at six months, on 27th Nov. next, shall be then paid out of money to be received from St. Phillip's Church, say amount to 174*l.* 13*s.* 5*d.* W. Clarke, to Boothey;" was holden an insufficient guarantee, for not stating the consideration. (x)

But when the consideration may *fairly be collected or intended* from the words of the agreement, then it is sufficient. Thus, "I guarantee the payment for any goods which T. S. delivers to J. B.," is sufficient, the future delivery of the goods being apparently the consideration. (y) So, "I hereby guarantee the present account of Miss H. M. due to R. T. L. and Co. of 112*l.* 4*s.* 4*d.*, and what she may contract from this date to the 30 Sept. next;" has been considered sufficient. (z) So a guarantee "that P. C. shall faithfully and honestly discharge any duty assigned to or trust reposed in him," and upon which the

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(p) 1 Stark. R. 10; 1 M. & S. 557, ante.

(q) *Coleman v. Upcot*, 5 Vin. Ab. 527; but see ante, 1 Russ. & M. 394.

(r) *Wain v. Walters*, 5 East, 10; 1 Smith, R. 299.

(s) 5 East, 10.

(t) 4 B. & Ald. 595.

(u) 6 Moore, 86; 3 Bro. & B. 14.

(x) 3 Bing. 107.

(y) 9 East, 348; 1 Campb. 242; 6 Esp. R. 89; 6 Bing. 201.

(z) 6 Moore, 521; 3 Bro. & B. 211; and see other instances, *Holt's C. N. P.* 153.; 3 Moore, 15; 1 Bing. 216; 15 East, 272.

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When or not
a guarantee is
continuing.

plaintiff employed P. C. is sufficient, the consideration appearing on the face of the instrument.(a)

Questions also frequently arise, whether the guarantee was confined to a single transaction or was *continuing* and extended to all or to some subsequent transactions.(b) Where the defendant engaged in writing, to guarantee the plaintiff, "for any goods he hath, or may supply my brother, H. P. with, to the amount of £100," the court held it a continuing or extending guarantee for any debt which might at any time become due for goods supplied, until the credit was recalled, and that the meaning of it was, that the defendant would be answerable at all events for goods supplied to his brother to the extent of 100*l.* at any time, but that he would not be answerable for more than that sum;(c) and so where a guarantee stated, that the defendant had been applied to by his brother, W. W. to be bound to plaintiff for such debts as he might contract with them, and then added, "I consider myself bound to you for any debt he may contract for his business as a jeweller, not exceeding 100*l.* after this date," it was decided that the defendant was answerable for any debt, not exceeding 100*l.*, which W. W. might *from time to time* contract with plaintiff in the way of business, and that the guarantee was not confined to one instance but applied to debts successively renewed;(d) but a guarantee of the payment to A. B. "to the extent of 60*l.* at quarterly account, bill two months, for goods to be purchased by him of the plaintiff," is not a continuing or standing guarantee to that extent for goods to be at any time supplied to A. B. until the credit is recalled.(e) So a guarantee for payment for coals to the amount of 50*l.*, which defendant would be answerable for at any time, is not a continuing guarantee.(f)

Nearly the same precautions should be observed on the behalf of a party *guaranteeing* as on the part of a *surety*, and, therefore, reference to that head should be made.(g)

In case of a guarantee of the due payment of a bill or note he ought to have notice, if it be not duly paid, but he is not discharged by want of that prompt and strict mercantile notice to which parties on the bill or note itself are strictly entitled;(h) nor can he resist payment on account of want of notice or other

When a party
guaranteeing is
discharged from
liability.

(a) 2 Dow. R. N. S. 211; and see 6 Bing. 201, observations of Tindal, C. J., as to allowing too much strictness in construing guarantees; and see id. 248, 249.

(b) 6 Bing. R. 244, 276.

(c) 12 East, 227; 2 Campb, 436.

(d) 2 Campb. 413.; see 6 Bing. 244.

(e) 3 Bar. & Ald. 593; and see 2 Maule. & Selw. 18.

(f) 2 Chitty's R. 205; and 6 Bing. 276.

(g) *Ante*, 82, 83.

(h) *Warrington v. Furber*, 8 East, 242.

neglect, unless he can prove that he has really sustained damage by the neglect. (i) In general, *mere passive* conduct of an obligee, without expressly granting time to the principal obligor, will not discharge a surety; (k) nor will the circumstance of the principal obligor afterwards executing to the creditor another bond for a larger sum, or of the obligee obtaining a bond from another surety, discharge the surety; (l) and a surety has no right to say he is discharged from the debt if all that he rests upon is the *passive* conduct of the creditor in not suing; he must himself use diligence, and take such effectual means as will enable him to call on the creditor either to sue, or to give him, the surety, the means of suing. (m) But *agreeing* to give time and renewing bills without the knowledge or concurrence of a surety, will, at law as well as in equity, discharge the latter, in the case of a surety by simple contract, though in case of a bond he could not plead such agreement as a defence at law. (n) The terms upon which the guarantee was given, must in general be fully and strictly complied with by the creditor. (o) Taking a *cognovit* or warrant of attorney from the principal debtor, without giving him any *extra* time, does not discharge a surety. (p) It has been considered that a surety may, in equity, be discharged by the creditor's negligently losing the benefit of a collateral security. (q) But the signing the principal debtor's certificate does not discharge his surety. (r)

The liability of a surety or guarantee generally ceases upon the death of one of the parties for whose conduct he was to be responsible, unless otherwise provided. (s) Payments made after the death are in general to be applied in reduction of the oldest items of the current account, and not of the more recent items, (t) but in general the appropriation is for a jury. (u) If

Guarantee's
indemnification.

(i) Chitty on Bills, 8th ed. 474, 475, 476.

(k) *Eyre v. Everett*, 2 Russ. R. 381, 384, 416, 600; see other cases, Chit. Com. L. 324 to 330.

(l) 2 Russ. R. 381.

(m) *Id.* 384; and see *Gordon v. Calvert*, 4 Russ. R. 581. B. was hired as a clerk to A. and Co., but not for any definite period, and C. and D. joined with him in a joint and several bond to secure his duly accounting for his receipts, and C. died, and his executrix gave a written notice to A. and Co. that she would no longer remain surety; and thereupon A. and Co. communicated this notice to B., and required and obtained from him the bond of another surety. D. died and also the new surety, and four years and a half after the death of C., B. died, when deficiencies

were found in his accounts, *subsequent* to the notice; and it was held, that the executrix of C. had no equity to restrain A. and Co. from proceeding at law on the bond. See 2 Simons' R. 253; 7 Bar. & C. 809, S. C.

(n) *Coombe v. Woolfe*, 8 Bing. 156; *Holt's C. N. P.* 84. 399; *Davey v. Engendergrass*, 5 B. & Ald. 187; see the cases when a surety is discharged collected Chitty on Bills, 8 ed. 441 to 456.

(o) 5 Bar. & C. 269; 2 Dowl. & R. 22; 5 Bing. 485; but see *Fell on Guarantees*.

(p) 2 Sim. 12, 155, 253; 1 Turn. & R. 395.

(q) 2 Sim. & Stu. 457.

(r) *Brown v. Carr*, 7 Bing. 508; 5 Moore & P. 497; 2 Russ. R. 600. S. C.

(s) 4 Russ. R. 154.

(t) 2 Dow. & Clar. 211.

(u) 4 Russ. R. 154.

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the surety or guarantee be called upon to pay the creditor, he should get a third person to *purchase* the security and claim on the principal, and take an assignment thereof and of all securities; for if he himself pay off the debt or security, it having been thus satisfied, he could not afterwards sue the principal debtor in the name of the creditor, although the security might afterwards be assigned to him, (v) and he would be only a simple contract creditor of the principal, (w) though it might be otherwise as to a mortgage security. (x)

II. & III. IN-
JURIES TO PER-
SONAL PRO-
PERTY, AND
REMEDIES AND
PUNISHMENTS.

In a preceding chapter we spoke generally of *Injuries* to Personal Property. We will here more particularly consider them; *first*, as they relate to *tangible* personal property, whether in *actual* or supposed possession of the owner, or whether the right is in remainder or reversion, or vested in several owners, with their appropriate remedies and punishments; and *secondly*, as they affect *choses in action* and their remedies.

First. Injuries to personal property in possession, remedies and punishments.
1. Illegal takings.

Civil takings, without crime.

1. Personal property in *possession* may be injured by *illegally taking* the same out of the possession of the owner, either by means not criminal, or by criminal means, and the latter may be by a *criminal illegal taking*, *felonious* at common law, or by *embezzlement*, where the original taking or obtaining possession was neither illegal nor felonious, or by obtaining goods, money, or valuable security by *false pretence*, or by *threats* of various descriptions, some of which are felonious, and others not so; or the injury may be by *detention*, either with or without criminal offence; or lastly, the injury may be by *damaging* the chattel whilst in the possession of the owner, and which also may be by acts not criminal or by criminal acts; the former by bailees and others, whether by malfeasance, misfeasance or nonfeasance; and the latter may be felonious or malicious to the owner, or malicious towards an animal, as enumerated in the statute against cruelty to animals, &c.

The *remedies* for injuries to personal property in possession are of three descriptions, viz. *preventive*, *compensation*, and *punishments*. Thus the owner may *prevent by resistance* an illegal taking by force, not using a dangerous instrument; (y) and *recaption* is legal; and if under colour of an execution against the goods of A. the goods of B. in his hands, obtained by fraud, be taken by the sheriff, B. may take them out of the custody of the sheriff, even by stratagem. (z) So goods obtained

(v) 4 Russ. R. 277; 1 Turn. & R. 224.

(w) 1 Turn. & R. 224.

(x) *Id.*, *ibid.*

(y) 3 Bla. C. 3, 4; 2 Inst. 516.

(z) 3 Bla. C. 4, 304; 1 Bar. & C. 514;

2 Dow. & R. 755; 1 Mood. & M. 107.

by false pretences, under colour of a purchase, may be retaken by the vendor out of the hands of the purchaser or his assignee; (a) and if a vendor discover that the purchaser is insolvent, he may stop them *in transitu*, (b) a right which he himself must exercise, for a Court of Equity will not interfere to stop goods *in transitu*. (c) If the goods cannot be retaken without committing or occasioning a breach of the peace, then the remedy is by replevin, (d) or by action of *detinue*, though taken by force; (e) and sometimes a Court of Equity will compel the delivery of a specific chattel. (f). So an action of trover lies to recover the value of a personal thing illegally taken or detained, (g) or trespass, where the taking was illegal. (h) When the value of the thing taken or the damage done to it does not exceed 5*l.*, and the taking or injury does not constitute a felony, punishment, and sometimes compensation, may be obtained summarily before a justice of the peace, (i) and a summary proceeding is also afforded with respect to game. (k)

If the original taking were *criminal* and *felonious*, (l) the common law as well as the statute (m) subjects the offender to an indictment for *larceny*, whenever the goods and chattels or thing taken were in legal contemplation moveable personalty, and not part of the realty, and also valuable, (n) and also when the original *taking* was not only illegal but also *felonious*; but if the *taking* were legal or not felonious, and only the *subsequent* misapplication of the property was criminal, then at common law no indictment for larceny was sustainable, and that determination occasioned the passing of the statutes to render the embezzlement by servants and others punishable. Thus if a master gave a servant a 5*l.* note to get changed, and the servant absconded with the money, this was not larceny, or punishable at common law, because there was no felonious taking, but under the acts against embezzlement it is now indictable. (o) As to some animals and things of superior value, as horses, cows and sheep, and certain enumerated valuable securities, the larceny was declared capital by statute. (p)

(a) 7 Taunt. 59; *post*.

(b) *Post*.

(c) 2 Jac. & W. 349.

(d) 2 Stark. 288; 1 Chit. Pl. 188.

(e) 1 Chit. Pl. 139.

(f) Chit. Eq. Dig. tit. Chattels Personal, and tit. Estate, IX., *et post*.

(g) 1 Chit. Pl. 176, 177.

(h) 3 Wils. 336; 1 Chit. Pl. 197.

(i) 7 & 8 G. 4, c. 29, and *id.* c. 30, s. 24.

(k) 1 & 2 W. 4, c. 32, s. 31 to 37.

(l) When not so, see an explanatory case, *Rex v. Alexander*, Burn's J., Horses, I.; *Id.* Larceny; 2 Inst. 316.

(m) 7 & 8 G. 4, c. 29. The halves of country bank notes, 4 Car. & P. 535.

(n) When not, see *ante*, 95, and *Rex v. Searing*, Russ. & R. 350.

(o) *Rex v. Sullens*, cor. twelve judges, A.D. 1820, Carr. Cr. L. 318, 319.

(p) 7 & 8 G. 4, c. 29, *per tot* altered as to horses, &c. by 2 & 3 W. 4, c. 62.

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Robbery is punishable capitally with death. (q) *Stealing privately* from the person is punishable with transportation for life or seven years, or four years' imprisonment. (r) *Sacrilege* and *burglary* are punishable capitally with death, (s) and so was *housebreaking* in the day-time, (t) but the capital punishment of death for the latter, and for stealing horses, cows or sheep, or killing the same with intent to steal them, is now repealed, and the punishment is only transportation for life. (u) The stealing from particular places is by various provisions in the same act rendered penal, with varying punishment; (x) and felonious stealing by tenants, and lodgers, and clerks, and servants and others, are punishable with transportation; (y) and the taking of *deer*, *hares* and *rabbits*, *fish*, &c. is specially punishable under the 7 & 8 Geo. 4, c. 29. (z)

It will be obvious that as the law allows *resistance* of attempt to take by means not criminal, so it ought to and does permit resistance when the taking would be criminal. (a) But with respect to *recaption* it is not so, for in many cases of *felonious* takings the owner cannot retake his property, or have restitution, until after he has performed his duty to the public, by prosecuting the offender to conviction or acquittal, after which the Court will award restitution, unless where a negociable security has got into the hands of a *bonâ fide* holder for value. (b)

In general, however, the owner may *retake* the thing stolen, unless sold in *market overt*, (c) and a pawnbroker's shop is not a market overt to prevent such recaption, and trover always lies against a pawnbroker after demand by the owner, (d) and before the above act, in case of a sale in market overt, still after the owner had prosecuted the felon, he was entitled to retake or recover from the person *then* in possession. (e) With respect to *horses*, there is a peculiar law under the statute 2 & 3 Ph. & M. c. 7, and 31 Eliz. c. 12, by which, unless there has been a sale in market overt, with all the precautions required by the acts, the owner may retake or sue at any time; (f) but after a regular sale, pursuant to the acts, the owner cannot maintain trover until after conviction; (g) and although the law thus allows a person in certain cases to retake, yet it is illegal and

(q) 7 & 8 G. 4, c. 29, s. 6.

(r) Id. *ibid*.

(s) Id. s. 10, 11.

(t) Id. s. 12.

(u) 2 & 3 W. 4, c. 62.

(x) 7 & 8 G. 4, c. 29, s. 12; see next Chapter, *post*, as to the description of particular places.

(y) 7 & 8 G. 4, c. 29, s. 45, 46.

(z) Sect. 26. See 5 Car. & P. 135, as to the proper form of conviction.

(a) 3 Bla. C. 4, note 3; 1 Mood. & M. 107.

(b) 7 & 8 G. 4, c. 29, s. 57.

(c) 2 Bla. 449; Burn's J., *Horses*, II.

(d) 2 Stra. 1187; 1 Stark. R. 472; 2 Campb. 336; 1 Wils. 8; 2 Bla. C. 440.

(e) 2 T. R. 750.

(f) Id. s. 5; Burn's J., *Horses*, II.; 2 Bla. C. 451.

(g) 2 Car. & P. 41, 43.

punishable to *advertise a reward* for the return of the thing stolen without asking questions, or otherwise stipulating not to prosecute. (*h*) In cases of *horses feloniously* stolen, justices have express power to afford summary relief, (*i*) but that power is confined to horses *stolen*, and does not apply when they have been obtained by false pretence, (*k*) nor do the statutes extend to other chattels whereof felony may be committed at common law.

Other statutes provide *summary punishment*, with power, in some cases, to award satisfaction for criminal takings and injuries to several things, of which larceny or felony could not have been committed at common law, as hares and rabbits, dogs, and beasts, and birds *usually confined*, pigeons, fish, certain trees and shrubs, wood fences, posts and rails, fruit, roots, vegetables, the taking of which did not constitute larceny at common law, but in all which cases justices now have summary jurisdiction. (*l*)

In cases of *felonious* takings in general, the remedy by action, as already observed, is *suspended* until after conviction or acquittal of the supposed offender; (*m*) but in the instance of horses, the civil action of detinue or replevin is expressly reserved, unless there has been a regular sale in market overt, (*n*) and it is expressly provided that when the taking of any chattel or thing is only a *misdemeanor*, as taking wills and writings, being evidence of title to an estate, the power to prosecute for the criminal offence and punishment shall not prevent, lessen, or impeach any remedy at law or in equity for the private injury. (*o*)

An illegal taking by *embezzlement* or *breach of trust* was not at common law punishable; but now, if a clerk or servant, when employed as such, shall, by virtue of such employment, embezzle any chattel, money, or valuable security, he is to be deemed to have *feloniously* stolen the same; (*p*) and if a banker, merchant, factor, broker, attorney, or *other agent*, embezzle money, or securities for money entrusted to them, they are respectively guilty of an indictable misdemeanor; (*q*) but it is expressly provided that that enactment shall not affect trustees or mortgagees, or extend to bankers disposing of any lien; (*r*) and it is expressly enacted that those provisions as to all such agents shall not lessen any civil remedy which the party aggrieved would otherwise have. (*s*) So that a prosecution and also an action might be sustained at the same time against the

(*h*) 7 & 8 G. 4, c. 29, s. 59.

(*i*) 2 & 3 Ph. & M. c. 7; 31 Eliz. c. 12;
 Burn's J., Horses, 11.

(*k*) 2 Stark. R. 76.

(*l*) 7 & 8 Geo. 4, c. 29.

(*m*) 2 T. R. 750; 2 Car. & F. 41, 45.

(*n*) 2 & 3 Ph. & M. c. 7, s. 5.

(*o*) 7 & 8 Geo. 4, c. 29, s. 24.

(*p*) Id. c. 29.

(*q*) Id. s. 49.

(*r*) Id. s. 50.

(*s*) Id. s. 52.

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agent and his sureties. But these provisions only apply to embezzlements in case of a regular employment in the capacities enumerated, and do not extend to a person gratuitously engaging, on a particular occasion, to procure the discount of a bill, not being in any business within which such an employment regularly falls; for, *per* Lord Tenterden, it is true that for certain purposes a friend is an agent, but it was intended to confine the operation of the statute to persons acting in discharge of their *functions*. (t)

False pretences.

Another criminal mode of illegally taking goods from the possession of the owner is by a *false pretence*. This so far invalidates the sale, that re-capture by the owner, even by stratagem, is legal; (u) and an action of trover, or case, or assumpsit against the deceiver may, in general, be sustained. (v) The act is only punishable criminally as a misdemeanor by statute; (w) or, if several concur, they may be indicted for a conspiracy at common law. (x) A representation that the party could or would do a particular act, as that he could or would get a bill discounted, though he knew he could not, is not a false pretence within this act, but rather a breach of promise, and the false pretence must be of the existence of some fact; (y) nor is a false warranty without conspiracy *indictable*, (z) or the obtaining money upon a second sale or mortgage, concealing the prior incumbrance, indictable. (a) A false pretence being only a misdemeanor, the criminal punishment does not affect the right to proceed by a civil action of replevin, detinue or trover.

Obtaining by threats.

The obtaining personal property by *threats* is, in some cases, by the criminal law, punishable capitally. At common law the extorting money by threat or duress is indictable. (b) An assault, with intent to rob, or menacing, or by force demanding any property, with intent to steal, is felony punishable with transportation for life, or not less than seven years, or imprisonment for not exceeding four years, and whipping, if a male. (c) Any menace or threat to impute an infamous crime, with intent to extort, and thereby succeeding in extorting any chattel, is indictable as robbery, and punishable with death. (d) Sending a letter or writing, demanding with menaces any chattel, money,

(t) *Rex v. Prince*, Mood. & M. 21; 2 Car. & P. 517.

(u) 1 Bar. & C. 514; 2 D. & R. 755; 7 Taunt. 59.

(v) 1 Stark. 20; 9 B. & Cres. 59.

(w) 7 & 8 Geo. 4, c. 29, s. 53; even against a minor, *Burn's J.*, *Cheat*, I. For obtaining enlisting money, 10 Geo. 4, c. 6.

(x) 3 T. R. 98; 5 D. & R. 611; but not at common law, unless there was a

conspiracy of two or more; 1 Stark. R. 402; 4 Car. & P. 592.

(y) *Rex v. Clifford*, A. D. 1824, MS., and *Rex v. Goodhall*, Russ. & Ry. C. C. 461. See Chitty on Bills, 8 ed. 769.

(z) 1 Stark. R. 402.

(a) 1 Car. & P. 661.

(b) *Burn's J.*, *Threats*.

(c) 7 & 8 Geo. 4, c. 29, s. 6.

(d) *Id.* s. 7.

or valuable security, or threatening to accuse of *certain offences*, with intent to extort, is felony punishable with transportation for life, or seven years, or imprisonment for four years, and whipping, if a male. (e) Threats to destroy corn, hay, or straw, are also indictable. (f)

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Illegal *detentions*, where the taking was legal, may be by civil or criminal means. The former may be remedied by recaption when wrongfully detained by a person who ought to restore the thing to the owner, (g) or by *réplevin*, (h) or by action of detinue; (i) or sometimes by summons, as under the Pawnbrokers' Act, or statutes relating to servants detaining materials they have had to work upon, or by bill in equity for specific restoration of the chattel, as in the case of an heir-loom, &c. (k), or to recover compensation by action of trover, (l) or by seizure for a heriot, (m) or for tolls, (n), or by distress where rent, or poor-rate, or highway-rate, is not paid. (o) The criminal proceedings may be those in case of embezzlement, which we have before noticed. (p)

2. Illegal detentions

The injuries to personal property by *damaging* it whilst in the possession of the owner or a bailee, or of the wrong-doer himself, are of a civil or criminal nature. Those of a civil nature may be all injurious acts committed either forcibly or otherwise, and which render the chattel less valuable; and they may be committed by bailees or others having the legal possession, and constitute either breaches of express or implied contract, or torts independent of contract, and in which the remedy by action may be framed accordingly; (q) or they may be committed by third persons not having the legal or any possession, and when the remedy by action may be either trespass or case, according to the nature of the injury, as whether it were direct and immediate, and with force, in fact, or implied by law, or only consequential, or not even with implied force, and whether a nonfeasance, misfeasance, or malfeasance; and the remedy may also depend on the question whether the owner had an immediate right to the possession of the chattel, or whether his bailee had the right of possession, or his interest

3. Illegal damaging.

Civil injuries not criminal.

(e) 7 & 8. Geo. 4, c. 29, s. 8.

(f) 4 Geo. 4, c. 54, s. 3; Burn's J., Threats.

(g) 1 Bar. & C. 514; 7 T. R. 59; when not, see 8 Bing. 186; 1 B. & Adolp. 394; 1 Mood. & M. 107.

(h) 1 Chit. Pl. 188; 2 Stark. 288.

(i) 1 Chit. Pl. 139.

(k) 1 Chit. Eq. Dig. tit. Chattel Per-

sonal, and Estate, IX. *et post*.

(l) 3 Bla. C. 152; 1 Chit. Pl. 176.

(m) 2 Saund. 168, n. 1; 3 Bla. C. 15.

(n) *Post*, ch. vii.

(o) *Id. ibid*.

(p) *Ante*, 133.

(q) See in general 1 Chit. Pl. 153 to 159.

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Criminal injuries wilful or malicious.

was in remainder or reversion; an action of trespass is, in general, the proper remedy for a direct injury with force to a chattel in the actual or implied possession of the owner, but *case* is the only proper remedy when the injury was only consequential, or the owner's right of possession was in future; (*r*) and *case* is always the proper remedy for negligence or non-feazance, or where the property affected is not tangible, and where it would be obviously an illogical statement of the injury to describe it as committed with force. (*s*)

Injuries and damage to personal property, without taking the same out of the possession of the owner, and sometimes when committed by the owner himself, are also punishable, and, in some cases, compensated by proceedings under the *criminal law*, some by indictment, and others by summary proceedings before a magistrate. The principal statute against malicious or wilful injuries to property is the 7 & 8 Geo. 4, c. 30. (*t*) Thus, unlawfully and maliciously cutting, breaking, or damaging any goods or articles of silk, woollen, linen, or cotton, mixed or unmixed, and certain other specified manufactures in hose, lace, &c., is felony transportable for life; (*u*) destroying threshing machines, or other machines employed in any manufactory, is felony, and seven years transportation; (*v*) pulling down, or destroying or damaging any steam-engine for working a mine is felony, with transportation or imprisonment; so riotously and tumultuously destroying any machinery, whether fixed or moveable, prepared for or employed in any manufacture; (*y*) setting fire to or destroying any ship or vessel, whether or not in an unfinished state, is punishable capitally, (*z*) and damaging otherwise than by fire is felony, punishable with transportation for seven years, or imprisonment for two years, and whipping, if a male; (*a*) and exhibiting false lights or signals, with intent to bring a ship into danger, is felony, punishable capitally. (*b*) Maliciously killing, maiming, or wounding any cattle, is a transportable felony; (*c*) setting fire to stacks of corn, grain, pulse, straw, hay, or wood, is felony, punishable capitally; and setting fire to any crop of corn, grain, or pulse, whether standing or cut, or to any part of a wood, coppice, or plantation of trees or heath, gorze, furze, or fern, is a transportable felony; (*d*) hop-

(*r*) 1 Chit. Pl. 193 to 200; 2 Bar. & C. 984; 11 East, 571.

(*s*) Id. ibid. 1 Chit. Pl. 153 to 159; 3 Bla. C. 153, 154.

(*t*) See in general Burn's J., Malicious Injuries.

(*u*) 7 & 8 Geo. 4, c. 30, s. 3.

(*v*) Id. s. 4.

(*y*) Id. s. 8.

(*z*) Id. s. 9. How to describe the vessel and injury, and what a vessel, 4 Car. & P. 559, 569.

(*a*) Id. s. 10.

(*b*) Id. s. 11.

(*c*) Id. s. 17; Burn's J., Cattle.

(*d*) Id. s. 17; how to describe a stack of *haulm*, 4 Car. & P. 245; stack of *barley*, Id. 548.

binds and growing trees, vegetables, &c., are also protected by the same act, (e) but which will be stated in the next chapter respecting real property.

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When in feloniously destroying a house, furniture or personal property therein is destroyed or damaged, the hundred is liable to make compensation for the whole of the injuries. (f) In other cases of malicious injuries of various descriptions, punishments are provided; (g) and when the injury does not exceed 5*l.*, a justice may fine or afford compensation summarily. (h) Under the 24th section of the act just alluded to, it has been holden, that if a small dog run after and bark at a party, and he thereupon beat him with unreasonable violence, under colour of self-defence, and thereby materially injure the dog, he may be proceeded against summarily before a justice for such injury; and although he may have left the premises, and gone a mile off, he may nevertheless be immediately pursued and apprehended without warrant, and therefore such imprisonment will be lawful. (i) *Cruelty to animals*, committed even by the owner, is punishable under the 3 Geo. 4, c. 71; but bull baiting is not an offence within that act, which extends only to the enumerated animals. (k) The poisoning fowls by throwing poisoned food, was actionable at common law; and the attempt to poison game or destroy their eggs, is punishable by express enactment. (l) As one of the means of preventing or detecting the stealing or improperly killing horses, &c. slaughtering houses are placed under particular regulations. (m) Injuries to the British Plate Glass (n) and the English Linen Company, (o) and even mere *threats* to destroy corn, grain, hay, or straw, are punishable. (p) And at common law all *conspiracies* to injure the actual property of another person, or his trade, would be indictable; though not a mere conspiracy to commit a trespass, as to enter a preserve and destroy the game. (q)

In case of personal property, the *general* ownership, when the party is *entitled* to immediate possession, impliedly draws to it the constructive possession, though we have seen that in some cases actual possession is essential, as in that of a gift, or upon the assignment of goods, as against creditors, in which

Secondly. Injuries when interest in remainder or reversion.
Civil injuries.

(e) 7 & 8 Geo. 4, c. 30.
(f) Id. c. 31, *post*.
(g) Id. c. 30.
(h) Id. s. 24.
(i) 2 Mood. & Malk. Ni. Pri. R. 15.
(k) 3 Car. & P. 225; 1 Man. & R. Mag. Ca. 105. S. C.; Burn's J. Cattle, 569.

(l) 1 & 2 W. 4, c. 32, s. 3 to 24.
(m) 2 Geo. 3, c. 71; Burn's J. Horses.
(n) 13 Geo. 3, c. 38.
(o) 4 Geo. 3, c. 37, s. 16.
(p) 4 Geo. 4, c. 54, s. 3.
(q) 13 East, 228.

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cases actual possession is essential to perfect the right, with the exception of the mortgage or transfer of a ship. (*r*) In other cases the right suffices, and therefore the general owner of a personal chattel, though he has never had actual possession, may support trover or trespass for an injury, as if he were in fact in actual possession. (*s*)

But if the general owner has not the *right* of possession, as where his interest by the terms of grant or bequest is to have it only after the death of another living person, or when on any other ground his possession is only in remainder or reversion, or where he has parted with his right of possession, as by letting furniture for an unexpired term, then the injury to such chattel is not *immediate* to him, but consequential only, and therefore he cannot for any injury sue in trespass or trover, but must declare specially in case for the injury to his reversionary interest. (*t*) And in these cases an indictment for larceny should state the felony to have been as against the property of the temporary owner, as of the occupier of a ready-furnished lodging; (*u*) and this was one reason why at common law a lodger could not be guilty of stealing the furniture of ready-furnished lodgings; (*x*) but that difficulty was removed by the statute 7 & 8 Geo. 4, c. 29, s. 45, which declares that such a taking shall be felony, punishable as simple larceny; and the indictment may state the goods to have been, at the time of the felony, the property of the landlord. (*y*) Where however a bailee himself commits an act putting an end to the continuance of his interest, as destroying the thing, trespass or trover may sometimes be sustained; (*z*) as where certain machinery, together with a mill, had been demised for a term to a tenant, and he without permission of his landlord severed the machinery from the mill, and it was afterwards seized and sold by the sheriff under a *fieri facias*, it was held that the landlord might support trover even during the continuance of the term. (*a*)

The same rules apply to criminal proceeding; and in case of larceny of things demised by the owner, the indictment should therefore describe the property as that of the lessee, (*b*)

(*r*) 5 Bar. & Ald. 918.

(*s*) 2 Saund. R. 47, and notes; 1 T. R. 480; 7 T. R. 12.

(*t*) 4 T. R.; 7 T. R. 9; 1 Ry. & M. 99; 1 Price, 53; 5 Bar. & Ald. 826; 2 Campb. 464; 3 Lev. 209.

(*u*) R. & R. C. C. 411; R. & M. C. C. R. 26.

(*v*) Kcl. 24; Show. 50.

(*y*) Burn's J. Larceny, 556, 557; Collyer's Stat. 334.

(*z*) 2 Campb. 464; 3 Campb. 187; 5 Esp. R. 35; see in general 1 Chit. Pl. 174, 175.

(*a*) 5 B. & Ald. 826; 3 Stark. R. 130.

(*b*) R. & R. C. C. 411; R. & M. C. C. R. 26.

unless he himself were the criminal, in which case, by express enactment, he may be indicted for larceny as of the goods of the lessor ; (c) or except in the case of *fixtures*, when, although the use of them has been demised, they may by express enactment be described as the property of the lessor. (c) It should seem that justices have summary power to fine and award compensation for wilful or malicious injuries, not exceeding 5*l.*, as well to personal property in remainder or reversion as in possession. (d) And we have seen that if a tenant or lodger be guilty of larceny, it may be treated as a common larceny, though in truth the offence is to property in reversion. (e)

Where the owner of personal property in remainder or reversion has reasonable ground to fear that the property will not be forthcoming at the time when his interest will vest in possession, he may, in some cases, by filing a bill in equity, secure the property against waste. (f)

When personal chattels belong to several owners, and one of them injures the same, in general the remedy against him cannot be by the ordinary actions of trespass or trover, unless the thing be destroyed ; (g) as if one tenant in common destroy the whole flight of a dove-cote, or all the deer in their park, in which case trespass might be sustained ; (h) but otherwise the remedy would be only by action on the case. (i) In the case of ships, or other property of considerable value, a Court of Equity will interfere to prevent injury, and regulate the exercise of ownership by each party. (k)

Thirdly. Injuries where the property is in joint tenancy or tenancy in common.

With respect to injuries to things *not tangible*, the right to which is in possession, they may be to copyrights in books or music, busts and sculptures, engravings and prints, inventors of *patterns* for linen, calicoes, &c., and the ownership in *patents* in general. Injuries against these are usually compensated by penalties and actions particularly provided by the statutes, which create or protect the exclusive right of the author or inventor, and will be found in the statutes before referred to. It has also been considered that an action might be sustained at common law. But although not noticed in the statutes, the

Fourthly. Injuries to things in possession, but not tangible.

(c) 7 & 8 Geo. 4, c. 29, s. 45 ; Burn's J. Larceny, 556, 557 ; *ante*, 138.

(d) 7 & 8 Geo. 4, c. 30, s. 24, *sed quære*.

(e) Id. c. 29, s. 45 ; *ante*, 138.

(f) See *post*, ch. viii. ; Chit. Eq. Dig. Chattels Personal and Estate, IX.

(g) Com. Dig. Estate, K. 8 ; 8 T. R. 146 ; 8 Bar. & C. 257, 268.

(h) Id. *ibid*.

(i) Id. *ibid*.

(k) *Post*, ch. viii.

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Fifthly. In-
juries to choses
in action, and re-
medies, and pu-
nishments.

preventive remedy by injunction, obtained by filing a bill in equity, is by far the most efficacious, and therefore will hereafter be very fully considered.

II. The civil injuries to *choses in action* are principally *breaches of contract*; but there are some unconnected with contract, as the nonpayment of legacies, &c.; and there are some injuries of a criminal nature, as forgery, &c. *Contracts*, we have seen, may be of *record*, as recognizances and judgments; or by *specialty*, as bonds, &c. under *seal*; or *simple contracts* not under seal, and whether written or verbal. The subjects of the contract may be infinitely various, and the injuries or breaches equally so. In general the injuries are nonpayment of money, or the omitting to perform or improperly performing some other act, or the doing some act that ought not to have been performed at all, such as deceitful representation. (*l*) It would be beyond the scope of this summary to enumerate all the contracts and injuries which may affect choses or rights of action.

Civil remedies.

The remedies in cases of nonpayment of *debts* may be by *set-off* under the statutes introducing the right of applying cross demands in discharge or satisfaction of each other; (*m*) but these do not enable a party to set off a simple contract debt against a judgment, (*n*) though upon motion the courts will, when the parties are the same, or the cross demands due in the same rights, upon motion, allow one judgment to be set off against the other, (*o*) and sometimes will even suspend execution in one action until the judgment has been perfected in the cross action, so as to be capable of being set off upon motion. (*p*) The *Bankruptcy Act* directs that *mutual credits*, as well as *mutual debts*, shall be set off against each other; (*q*) but the mutual credit must be of a nature that would at maturity end in a debt, and not in a claim for unliquidated damage. (*r*)

Debts for *rents*, when due under an actual demise, and when the creditor has a reversionary interest, may be distrained for, but not otherwise. (*s*)

If payment of money can only be obtained by suit, then the

(*l*) To sustain an action for falsely representing a third person proper to be credited with money or goods, there must have been a written guarantee stating the consideration, pursuant to the statute against frauds, or a written deceitful representation under 9 Geo. 4, c. 14, *post*, 142.

(*m*) 2 G. 2, c. 22, s. 13; 8 G. 2, c. 24, s. 4.

(*n*) 6 Taunt. 176; 8 Bing. 202; 7 Bing. 29, 61.

(*o*) Tidd, 9 ed. 911; and see 7 Bing. 435, *et id.*

(*p*) 7 Bing. 435.

(*q*) 6 G. 4, c. 16, s. 50; 8 Bar. & Cres. 105.

(*r*) 9 Bar. & Cres. 744.

(*s*) But not if the occupation be under a mere *agreement* for a prospective demise, Taunt.; or where the claimant has no reversion. See chap. vii.

remedy for a debt on *record* is by action of debt or *scire facias*; the former will be proper if there be a large arrear of interest, which it is probable will be recovered; but if the judgment has been only recently recovered, the plaintiff would obtain no costs without the leave of the judge, which would not be obtained in general; and, therefore, in general, *scire facias*, after a year has elapsed, is most proper. (t) If the debt be secured by *specialty*, then it is to be recovered by action of debt or covenant. If by *simple contract*, then by action of assumpsit, or by action of debt, provided the whole sum payable be completely due, but not if payable by instalments, and one of them be not yet due. (u)

Sometimes also a summary remedy by *arbitration*, or by application to magistrates for wages of labourers and servants in trade, is *compulsory*. (x)

If the contract were to perform affirmatively some other act than the mere payment of money, as if it were to convey an estate or an interest in land, or made upon the transfer of the goodwill of a business, and to deliver certain books relating thereto, (and not a mere ordinary sale of a *personal* chattel, the remedy for the breach of which would be adequately compensated by a verdict for damages at law,) a bill in equity may sometimes be filed to compel *specific performance*. (y) And on the other hand, if the contract were *negatively*, as not to do some act, as upon the sale of a coach concern or other business, not to run an *opposition coach*, or interrupt the concern, then the purchaser may file a bill against the vendor, and restrain him by *injunction* from running any coach, or otherwise violating his express contract. (z)

In cases also of breaches of stipulations in leases, in respect of which a clause of forfeiture or re-entry is expressly provided, effectual redress may be obtained, when the lease is valuable, by entering and vacating the lease. (a)

But in general the remedy for the breach of contract to perform or omit the performance of any act, is an action of cove-

(t) 43 Geo. 3, c. 46.

(u) 1 H. Bla. 547; 5 Bing. 200.

(x) 9 Geo. 4, c. 92, as to *friendly societies*; *Crisp v. Banbury*, 8 Bing. 394; and as to *servants*, 5 Geo. 4, c. 96, *post*.

(y) 1 Sim. & S. 174, 690; Chit. Eq. Dig. Agreement, XI., 42 to 63, *post*. When a bill lies to compel performance of specific agreement to enter into partner-

ship for a term, 16 Ves. J. 49; so to deliver a book used in a trade sold to complainant, 1 Sim. & S. 690.

(z) 2 Swanst. 253; 2 Mad. 198; Chit. Eq. Dig. 1053; 3 Chit. Com. L. 622, 623; and as to the cases when an *injunction* will be granted against a breach of covenant, contract, or trust, *post*, chap. viii.

(a) *Roe v. Galliers*, 2 T. R. 133.

CHAP. III.

II. III.
INJURIESTO
PERSONAL
PROPERTY.

Sixthly, Injuries
by deceit, but
relating to a
contract.

nant, if the instrument were under seal; (b) and if not, then an action of assumpsit.

There are numerous choses in action or rights to sue, which are in some measure connected with contracts, and yet the remedy is not for a breach of contract, but for *deceit* or *misrepresentation*, which has occasioned damage to a party. Thus if a person assuming to accept a bill for another, represent that he is authorized so to do, and the holder in consequence retain the bill, and sue the supposed acceptor, and be nonsuited, and have to pay costs, he may afterwards sue the pretended agent for the amount of the bill and the costs, though the jury negative fraud. (c) So if a person fraudulently obtain goods on credit, he may be sued specially in case for the fraud before the expiration of the credit, though he could not be sued as for goods sold until after the credit had expired. (d) So if a party be induced to give more for goods sold by written particulars by a verbal misrepresentation of the auctioneer, he must sue specially for the deceit, and is bound to perform his written contract. (e) And whenever there has been actionable deceit, the action should be expressly founded thereon. (f) Actions for misrepresenting the solvency or character of a third person, in order to induce a trader to give him credit, have been restrained by the recent enactments requiring such representations to be in writing, and signed by the party making it. (g)

Choses in action, *independently of contracts*, are claims for *legacies*, *distributive shares*, and rights to receive or recover payment of money or damages, or a penalty under various statutes, such as contribution towards the expense of a party-wall, &c.

In general no action is sustainable even for *specific legacy*, still less for a legacy payable out of general assets, and the same is only recoverable in a Court of Equity or in the Spiritual Court. But in the case of a *specific legacy* of a moveable chattel or a chattel real, if the executor express his assent, the legal interest therein immediately vests in the legatee; and he may take possession or maintain actions as if in actual possession,

(b) Com. Dig. Covenant, A.

(c) 3 Bar. & Adol. 114; 7 Bing. 107;
6 Bing. 396.

(d) 9 Bar. & Cres. 59.

(e) 12 East, 11; 6 Taunt. 522.

(f) 4 Campb. 22, 144, 169; 12 East,
11; 3 Bar. & Cres. 623; 3 Price, 54;

4 Taunt. 488, 647, 779; 6 Taunt. 522.

(g) 9 Geo. 4, c. 14, s. 6. By a singular mistake in printing that clause, the reading is not clear. *Semble*, that it should be "obtain money or goods upon credit," and not "credit, money, or goods upon, unless," &c.

and may maintain ejectment to recover the property if entitled to immediate possession. (*h*) In case of a legacy or distributive share to be paid out of the general assets of the testator, the mere assent of the executor will vest no legal interest, nor can any action be supported to recover the value, unless the executor expressly promise in writing to pay, and then there also must be a *new consideration*, such as forbearance, to give effect to such a promise, and enable the legatee to sue at law. (*i*) Unless there be an express new consideration, and express promise thereon, the remedy for such pecuniary legacy is only in equity, (*k*) or in the Ecclesiastical Courts; (*l*) or by action on the administration bond after (and not before) decree in the Spiritual Court. (*m*) If the executor offer to pay the legacy, but impose certain conditions, the performance of which he has no right to require, he will be liable to pay the costs of a suit in equity against him. (*n*)

With respect to the remedy to compel contribution towards the expense of a party-wall, the building act expressly provides an action. (*o*)

The *criminal injuries* relating to choses in action are principally the false making or *forgery*, prohibited and punished by several acts, but principally by the 11 Geo. 4, and 1 W. 4, c. 66; (*p*) and the act 2 & 3 W. 4, c. 123, taking away the punishment of death, excepting in cases of forgery of certain public documents; and the offences of *larceny*, *embezzlement*, and *false pretences*, as regards bills of exchange and other valuable securities, are also punishable under the 7 & 8 Geo. 4, c. 29. The forging an instrument having the *semblance* of a valid instrument, and likely to deceive, is an offence, though the instrument would not be perfectly valid for civil purposes. (*q*) But as to larceny and other offences of that nature, they are not committed unless the bill or valuable security stolen would have been valid and duly stamped, and enforceable in a civil action. (*r*)

Criminal injuries to choses in action, and punishment.

The stealing or *injuring* of records and legal proceedings and

(*h*) 3 East, 120; 3 Atk. 224; Cowp. 284, 289.

(*i*) 5 T. R. 693; 2 Lev. 2; Peake's R. 73; 1 Moore & P. 209; 7 Bar. & Cres. 542; *ante*, 110, 112.

(*k*) Chit. Eq. Dig. Legacies, 1411, 1414; 3 Ridg. P. C. 243.

(*l*) *Id.* *ibid.*

(*m*) 8 Bar. & Cres. 151; 2 Man. & R. 136.

(*n*) 1 Russ. Rep. 375; 1 Russ. & M.

70; a legacy may also be secured by injunction, 1 Russ. & M. 277, &c.

(*o*) 14 Geo. 3, c. 78, s. 41; Chitt. Col. Stat. Building Act.

(*p*) See cases and proceedings thereon, Chit. on Bills, 8 ed. 734 to 764.

(*q*) See Chitty on Bills, 8 ed. 742, 743.

(*r*) *Rex v. Pooley*, 2 Leach, 887; *Rex v. Yeates*, *cor.* twelve judges, A. D. 1828; Car. Crim. L. 3 ed. 273.

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documents, (s) and the concealing or destroying any will, codicil, or any testamentary instrument; (t) and the stealing writings relating to real estate, (u) and the stealing bills of exchange and other valuable securities before enumerated, (x) are made criminal. But it does not appear that there is any particular criminal enactment against damaging or injuring any bill of exchange or other valuable security, excepting a record or a will as above prohibited, or excepting where the act amounts to a larceny or forgery; though, where any malicious injury has not exceeded 5*l.* it would be punishable under the general clause against wilful and malicious injuries to any public or private property; (y) and it should seem that an action on the case might be supported for illegally cancelling the acceptance of a bill, or altering the bill itself, so as to render it invalid, unless the owner assented to the alteration. (z)

(s) 7 & 8 Geo. 4, c. 29, s. 21; *Rex v. Walker*, R. & M. C. C. 155.
(t) *Id.* s. 22.
(u) *Id.* s. 23.

(x) *Id.* s. 5.
(y) 7 & 8 Geo. 4, c. 30, s. 24.
(z) 1 Taunt. 420; 6 East, 309.

CHAPTER IV.

RIGHTS TO REAL PROPERTY, THEIR INJURIES AND REMEDIES
IN PARTICULAR.

<i>Rights to Real Property.</i>	Freehold.
Nature of Real Property in general.	Of Inheritance, whether of
Distinguished from Personality.	Freehold or Copyhold.
Division of Subject under Seven	In Tail.
Heads.	For Life.
<i>First.</i> The different Kinds or Sorts.	Less than Freehold.
Must be Land or annexed to or	For years whether of Freehold
arising out of same.	or Copyhold.
Corporeal or Incorporeal.	From year to year.
Ten general Legal Terms consid-	At Will or Sufferance.
ered.	<i>Fourthly.</i> Time of Enjoyment.
<i>First.</i> Corporeal.	In Possession.
Distinguished from Incorporeal	In Remainder.
Kinds enumerated	In Reversion.
<i>Secondly.</i> Incorporeal.	<i>Fifthly.</i> Number of Owners.
Distinguished from Corporeal.	In Severalty.
Thirteen kinds enumerated.	In Coparcenary.
<i>Secondly.</i> The Tenures by which	In Joint Tenancy.
holden.	In Common.
Freehold.	<i>Sixthly.</i> Modes of Acquiring the
Copyhold.	Right.
Other Tenures.	1. By Descent.
<i>Thirdly.</i> The Estates or Interests	2. By Purchase, (<i>the several</i>
therein.	<i>modes considered.</i>)
Distinction between an Interest	<i>Seventhly.</i> Difference between Le-
and a mere Authority.	gal and Equitable estates.
Distinction between an Interest	II. & III. <i>Injuries, Offences, Rem-</i>
and a mere License.	<i>edies and Punishments, relating to</i>
	<i>Real Property.</i>

REAL Property is legally distinguished from **Personalty** *principally* in two respects; *first*, its *permanent* fixed and immoveable quality; and *secondly*, that the *interest* therein must be not less than for the term of the *life* of the owner, or of another person or persons; whereas **Personalty** is either moveable or readily capable of being so, or, as in the case of a lease for years, is considered as of so inferior a nature that it is not allowed the incidents and privileges of *real* property. (a) The several circumstances which distinguish real property from personality are, 1st. Its permanent and immoveable property, and the necessity for the owner having at least an estate for life therein, and on which account this property was formerly more regarded than personality, and particular laws were more carefully pro-

Distinctions between real property and personality in general.

(a) 2 Bla. Com. 386. Even a long term of years perpetually renewable, is not *real*, but only *personal property*, *ante*, 84, n. (a).

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vided for its security. 2ndly. Therefore an alien was not allowed to acquire an interest therein, it being the policy of the law to exclude him from any permanent interest in the soil. 3rdly. In respect, also, of such permanency, its owner has always been entitled, when a freeholder, to vote for representatives in parliament, and on other occasions, which the owner of personalty, until recently, was not. (b) 4thly. It descends from ancestor to heir, instead of becoming the property of an executor or administrator on the death of the owner, as in the case of personalty. 5thly. If freehold property be devised there must be three witnesses to the will, whereas no witness is in general essential to a bequest of personalty. (c) 6thly. In case of alienation it must, in general, be made by deed, (d) and *in presenti*, (e) whereas leases for years may commence *in futuro*, and mere personal chattels may be transferred by parol, or mere delivery. 7thly. Only a part of the annual value can be taken under an *elegit* against the owner, when the whole interest in personalty may be sold under an execution. (f) 8thly. In case of attainder of felony the interest in realty is only forfeited for life, whereas the entire interest in personalty vests in the crown. These, it will be observed, are exceedingly important distinctions between the two descriptions of property.

Mixed property partaking of personalty and realty.

We shall find, however, that there are some interests arising out of or connected with real property, which partake in some respects of the qualities of personalty, being of a mongrel amphibious quality. (g) Such as heir-looms, title deeds, &c. which though in themselves moveable, yet relating to the land, descend from ancestor to heir, or from a vendor to a purchaser. (h)

Personalty to be converted into realty and *vice versa*.

There is also another very important doctrine in equity, according to which substantially the nature of personal property, as money, and goods, &c., may be completely changed, and become as it were, for all the purposes of beneficial enjoyment, real property. Thus in a Court of Equity *money* directed to be laid out in lands will pass by the words, "lands, tenements, and hereditaments whatsoever and wheresoever," (i) it being a maxim in equity, that things to be done shall be con-

(b) But now by the late reform act, 2 W. 4, c. 45, s. 20, a right of voting is conferred on *copyholders*, *leaseholders*, and occupiers of land of a certain annual value.

(c) 2 Bla. C. 501, 502; Comyns, 452, note (16); 2 Phil. Ec. C. 213, 177; 1 Phil. Ec. C. 12.

(d) 5 Bar. & C. 221.

(e) That is when by a common law con-

veyance; but *secus* if under the statute of uses.

(f) But if there be two contemporaneous *elegits*, each plaintiff may take a moiety, and thus the whole, 5 Bing. 327.

(g) 2 Bla. C. 387, 388.

(h) 4 Bing. 106.

(i) *Rushley v. Master*, 3 Bro. C. C. 99; 1 Thomas's Co. Lit. 219, n. T.

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sidered as done, (*k*) and *vice versâ*; for trees, though growing, if sold by a tenant in fee, who dies before severance, are considered as personalty, and the executor, and not the heir, is entitled to receive the purchase money from the vendee.

We have now to take a practical view :—I. Of the *Rights* to Real Property, and these are to be considered as, regards, *first*, the nature of *the thing*, or the several sorts or kinds of real property. *Secondly*. The *tenures* by which they are holden, as whether free socage, (being freehold,) or copyhold, &c. *Thirdly*. The *estates*, or extent and nature of the *interests* therein, as whether of inheritance, or only for life, or less than freehold, as for years, or at will, or sufferance, and whether *legal or equitable*. *Fourthly*. As respects *the time of enjoyment*; as whether in possession, or only in remainder or reversion. *Fifthly*. As regards the *number of owners*, as whether in severalty, joint-tenancy, coparcenary, or in common. *Sixthly*. The *modes* by which the *title* or right may be *acquired* on the one hand, or *lost* on the other; as by mere possession, or by descent, or by purchase, whether technically or really so, as by alienations of different descriptions, or by devise, and *Seventhly*. The distinctions *between* legal and equitable estates.

General division
of the subject
under seven
heads.

First. A very accurate knowledge of the different descriptions and legal properties of every kind of real property, is essential as well to owners and occupiers, as to conveyancers and every other member of the legal profession, whether practising in the civil or criminal courts; and in particular as regards the construction of conveyances and wills, the poor laws, and civil remedies and criminal punishments. (*l*) The ownership of some of the most substantial and permanent kinds of real property give a right to vote in elections, and under the now repealed act created a qualification to kill game; and some kinds of real property are rateable to the relief of the poor, whilst others, though equally or more profitable, are not. (*m*) Again: as regards the modes of describing various kinds of real property in deeds and *civil* pleadings, much accuracy is requisite, as in real actions and ejectment; and though it has been well observed, that probably so much precision would not now be required as in many of the old cases, still it is important to know what are the appropriate names

First. Nature of
the thing, or the
several sorts or
kinds of real
property.

(*k*) Cruise's Digest; 1 Thomas's Co. Lit. 755, note U.

(*l*) See in general the enumeration of corporeal real property, Tidd, 9 ed. 1190;

and Adams on Ejectment, 3 ed. chap. 2^d and post.

(*m*) 43 Eliz. c. 2; Chit. Col. Stat. 768, and notes; and see Burn's J. Poor.

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and legal incidents of each. (n) So as respects *crimes* and *punishments*, and the liability of a hundred to make compensation, they greatly vary according to the precise description of the place in which the offence was committed; the law providing greater protection to dwelling-houses, and some enumerated buildings, and to gardens and land adjoining the same, and to some other descriptions of real property, than to land or other property at a distance; and the legislature has, with the same view, adopted certain terms of description, the application of which is important to be well known. (o)

Buildings, &c.
must answer
description at
time of injury.

We may here premise, as a general rule, that when buildings or lands are particularly named in a statute, they must precisely answer the description at the time when the injury was committed, and that a mere intention to convert a building, or land, &c. to a particular purpose, will not be sufficient unless the building or the land has been completed, and actually used for the particular purpose. (p)

All real prop-
erty must be
part of or an-
nexed to land
or proceed out
of same, and be
permanent.

Another very general rule is, that all *real property*, properly so termed, whether corporeal or incorporeal, must consist of *land*, or houses and buildings thereon, or of the *profits or easements issuing out of the same*, and must be of a *perpetually continuing* and *permanent* nature, (q) and that nothing can be deemed *real property* but when it is annexed to land or buildings; and, therefore, a mere stall or standing place, or booth placed in a market or fair, and not permanently annexed to the soil, cannot be treated as real property, or the subject of any action for the recovery of realty; and no action of ejectment for a supposed ouster from such a stall is sustainable, although the occupier had hired the exclusive right to use it during several days; (r) nor could such a structure by itself, any more than furniture, be rated towards the relief of the poor; (s) nor could burglary be committed in breaking into a tent or booth, erected in a fair or market, though the owner may usually sleep therein, for the law regards thus highly nothing but *permanent edifices*; and though it may have been the

(n) *Adams on Ejectment*, 3rd ed. 22 to 42.

(o) 7 & 8 Geo. 4, c. 29 to 31.

(p) 8 B. & C. 461, and *post*, 167, "*Dwelling-house*," as to the offence of burglary, &c.

(q) 2 Bla. C. 384; as to the term *permanent* being an essential part of the definition, see 1 Preston on Estates, 10; and Hen. Chitty on Descents, 11; and no term, even for 1000 years, is in law deemed *real property*, though as it is an interest in

realty, it is properly to be considered in this chapter, *ante*, 84, note (a).

(r) Per Lord Kenyon, Guildhall Sittings after Trin. T. 1796; and 1 Car. & P. 123; and see 2 East, 189. But if it had been a permanent building let into the ground, though only a butcher's stall in a market, to be used only on two days in the week, but the door fastened, it would have been otherwise, 4 B. & C. 683; 7 D. & R. 160.

(s) Cald. 262, 266; 1 T. R. 721.

choice of the owner to lodge in so fragile a structure, yet his lodging there no more makes it burglary to break it open, than it would be to uncover a tilted waggort under similar circumstances; (t) and for the same reason, it was held that the destruction of hustings erected for an election was not an offence within the 57 Geo. 3, c. 19, s. 38; (u) and the lessee of a stall in a market town, who came there weekly to sell his wares, was held not rateable to the repairs of a church, either as being an inhabitant, or occupier of a house or otherwise, (v) though if it had been a permanent building let into the soil the occupation of it might, before the recent acts, have given a settlement. (x) So where a windmill was made of wood and had a foundation of brick, but the wood-work was not inserted in the brick foundation but rested upon it by its own weight alone, and no part of the machinery of the mill touched the ground or any part of the foundation, it was held that the windmill, not being fixed to the freehold, nor to any thing connected with it, was not parcel of a tenement, and consequently that a pauper by occupying it gained no settlement. (y)

But although *personal* property, originally separated from any land or building, such as machinery and engines, cannot for all purposes be deemed *real* property, yet the very circumstance of the same being *annexed* to the realty will sometimes give the same some peculiar properties, liabilities, privileges or protections, and therefore they may here be properly noticed. Thus with respect to *liability* to the poor rate, when the annual value of land or houses has been enhanced by the *annexation* of a personal chattel, as a steelyard of a weighing machine, or a carding machine, or any other collateral circumstance, then the same may be rated according to the aggregate annual value, though the greater part may spring from the personal chattel so annexed; (z) and fixtures, when annexed to a building by a *freeholder*, cannot be taken under an execution against his goods; (a) and some fixtures would pass to the heir, and not to the executor of the owner, in the nature of heir-looms, being generally chattels which cannot be taken away without damaging or dismembering the freehold; (b) such as the posts or rails of

Annexations to land, &c. how far privileged as realty.

(t) 1 Hale, P. C. 557; 3 Inst. 64; Hawk. B. 1, c. 38, s. 17; 4 Bla. C. 225, 226.

(u) 3 Dowl. & Ry. 96.

(v) 2 Rol. Rep. 238; 1 Bott; 123.

(x) 4 B. & Cres. 687; 7 D. & R. 160.

(y) 1 Bar. & Adolph. 161; and see 1 Brod. & B. 506; 4 Moore, 284, S. C. as to when a windmill is a fixture or not.

(z) Cald. 262, 266; 1 T. R. 721.

(a) 5 B. & Ald. 686.

(b) 2 Bla. C. 427.

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an inclosure, furnaces or coppers fixed, (unless severed in the lifetime of the testator or ancestor,) the wainscots to a house, and pictures, or glasses fixed instead of wainscots, the glass in a window, or the doors and locks of a house, and the like. (b) So fixtures in a distillery or brewery, demised or suffered to remain in possession of a trader, would not pass to his assignees as goods or chattels in his possession as reputed owner. (c)

First, Corporeal Property, and distinction between the same and incorporeal.

The principal divisions and distinctions of Real Property, are those kinds which are *Corporeal* and those which are *Incorporeal*. The former having a *corpus*, and being visible and tangible, and capable of *actual seisin and possession*; the latter not so, but merely *issuing out* of or incident to permanent corporeal property, and not being the thing itself, nor capable of actual visible seisin or possession. Thus a *church*, and the *glebe land* belonging to it, are obviously corporeal and tangible, and capable of actual seisin and possession, and of which the parson, after he has been presented and inducted, has actual possession, and may maintain ejectment or trespass for being ousted therefrom. (d) But the *advowson* (being the mere *right to present* a parson to such church or other ecclesiastical benefice, and the owner of the advowson himself never being in the actual or even supposed possession of the church or glebe) is merely *incorporeal* property, because such *right* is not visible or tangible. This instance of an advowson completely illustrates the nature of an incorporeal hereditament; it is not itself the bodily possession of the church and its appendages, but is a mere *right* to give some *other* man a title to such bodily possession. The advowson is not the object of either the sight or the touch, and yet it *perpetually* exists in the *mind's* eye and in contemplation of law. It cannot be *delivered* from man to man by any visible bodily transfer, nor can corporeal possession or livery of seisin be had of it; such right itself produces no corporeal fruit or advantage to its owner, but is merely a right to place some clerk, whom the patron shall please to nominate, in the possession and enjoyment of the benefits resulting from the church and glebe. (e) Like all other incorporeal real property, in order to convey the *freehold* interest in an advowson, a grant by *deed* under seal is essential. (f) So with respect to another

(b) 2 Com. Dig. 280, 5th ed.; Hen. Chitty's Desc. 257.

(c) 9 East, 215; and see 3 B. & Cres. 368; 5 D. & R. 240, S. C.

(d) 12 Mod. 420, 433.

(e) 2 Bla. C. 21, 22.

(f) 1 Inst. 9; 2 Wood, 64; 1 Saund. 228; 5 Bar. & C. 221. See 2 Bla. C. 22, *contra*, but clearly a mistake as to an advowson passing by *parol*.

incorporeal hereditament, a *right of way*, the party entitled to it has no tangible or visible right, nor any interest in the land itself, but a mere easement over it, and to create which, or any other *freehold* easement, a grant by deed is essential, and if granted by parol it operates at most as a revocable *license*. (g) The distinctions between corporeal and incorporeal property are most important, not only as regards their distinct properties and incidents, but in respect of the modes of creating and conveying the rights therein, and the remedies; ejectment and trespass being in general the proper remedies for injuries to the former, but only actions, on the case, *quare impedit*, or other peculiar remedies, for many of the latter. (h)

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Before we consider every kind of corporeal real property in particular, there are some *general* terms used in law the meaning of which it is essential to know, and which general words it has been advised by a most eminent conveyancer, it may be advisable to introduce in most conveyances. (k) These are the words, "*tenements*," "*hereditaments*," "*appendant*, "*appurtenant* or "*appurtenances*," "*estate*," "*term*," "*farm*," "*close*," "*field*," "*emblemments*," "*fixtures*," &c. (l)

Meanings of
certain (ten)
general terms
relating to real
property. (i)

1. The term "*tenements*," though in vulgar acceptation meaning only a house or building, in its legal sense comprehends every thing that may be *holden*, provided it be of a *permanent* nature; and not only lands and inheritances which are holden, but also advowsons, offices, rents, commons, and profits *a-prendre*, wherein a man hath any franktenement, and whereof he may be seised *ut de libero tenemento*. (l) And under the word "*tenement*" in a will, an advowson in gross may pass to the devisee. (m) The import of the term "*tenement*" has been most frequently discussed in questions under the poor laws, especially under the older acts 13 & 14 Car. 2, c. 12, s. 1, and 9 & 10 W. 3, c. 11, relating to the same, which use the word "*any tenement* of the yearly value of 10*l.*," and under these acts it was held, that any person renting an *incorporeal hereditament*, as a fishery, &c. of the yearly value of 10*l.*, was a renting of a tenement, and gained a settlement. (n) But as the renting

1. Tenements.
(i)

(g) 5 Bar. & C. 221.

(h) Yelv. 143; Co. Lit. 4, a.

(i) In order very fully to examine these, see the several learned works referred to in 1 Thomas's Co. Lit. 219, note (44).

(k) 1 Prest. on Abstracts, 93; and see post, tit. Land.

(l) See in general Co. Lit. 6, a. marginal note (2); 1 Thomas's Co. Lit. 219;

Perk. sect. 114.

(m) 4 Bing. 293; and see Fort. 354, 351; 3 Atk. 464; Ca. Temp. Talb. 143.

(n) 1 T. R. 358; 3 T. R. 772; 3 East, 113; 5 East, 239, and other cases Burn's J., Poor, 525 to 541. But a mere standing place in a mill for a carding machine, was considered not to be a tenement. 2 East, 139.

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of such incorporeal interests was found too much to increase the privilege of settlement, the acts of 59 Geo. 3, c. 50, and 6 Geo. 4, c. 57, and 1 W. 4, c. 18, were passed, limiting the occupation to a more substantial and particular kind of tenement, viz. a "*dwelling-house*" or "*building*," or of "*land*," or of both, at at an entire rent of 10*l.* a year, and under which it has been held, that a demise of a house *and tolls* at an *entire* rent, is not now a tenement within the meaning of the latter acts, (o) and the building must be annexed to and part of the freehold; and it is expressly provided, that the renting of a toll-house shall not be deemed a tenement so as to give a settlement. (p) Under these and other acts it has been holden, that to constitute a tenement under the poor-laws, the thing must be part and parcel of the freehold, or annexed to a part of land or buildings, and therefore a wooden windmill placed upon, but not let into a brick foundation, or a barn upon blocks, although demised for a term of years by a landlord who was owner of the soil, cannot be deemed a *tenement* or "*building*" in the legal signification of that term, but only a personal chattel, nor could the so holding the same give the occupier a settlement. (q)

However, provided the tenement arise out of *realty*, it may be of a substantial or unsubstantial kind, and either corporeal or incorporeal, and therefore as an action of ejectment is not sustainable for the latter, (with the exception of tithes and common appurtenant,) the term "*tenement*," unless used in reference to a *previous* description, is too general and uncertain in a declaration in ejectment or trespass, and the particular kind of thing should be stated, as "*a messuage*," "*a barn*," "*an out-house*," though the objection would now be aided after verdict. (r) Nor is the word "*tenement*" a sufficient description in a *fine* of any thing of which it is intended to be levied, as it may consist of a messuage, or land, or any incorporeal property lying in tenure, and therefore not sufficiently particular; (s) but in a *deed* every thing that may be holden, being of a permanent nature, may pass not only houses, buildings or land, but even rents, commons, offices, and the like. (t) The term "*tenements*" and the term "*hereditaments*," whether in a deed, lease or will, is to be understood as intending to describe or allude to

(o) *Rex v. Andrews*, Cambridge, East. 11 Geo. 4; Burn's J., Poor, 541.

(p) 1 B. & Adol. 161; 54 Geo. 3, c. 170, s. 5; 3 Geo. 4, c. 126, s. 51; 4 Geo. 4, c. 95, s. 31.

(q) 1 B. & Adol. 161; 1 Brod. & B. 506, ante, 149, n. (y); 4 Moore, 281, S. C.

(r) 8 Bar. & C. 70, and 1 M. & P. 330.

(s) 1 Leon. 188.

(t) Co. Lit. 6, a.

such *things* as may be subject-matter of tenure, but not the estate or *interest* in such things, and cannot therefore by its own intrinsic force enlarge an estate *primâ facie* only a life estate into a fee. (u)

2. The term *hereditaments* is still more comprehensive, and includes whatever may be *inherited*, be it corporeal or incorporeal, real, *personal* or mixed, and including not only lands and every thing thereon, but also heir-looms and certain furniture, which by custom may descend to the heir together with a house. (x) The settled sense of the term "*hereditaments*" is to denote such *things* as *may* be the subject-matter of inheritance, but not the inheritance itself, and it cannot therefore by its own intrinsic force enlarge an estate *primâ facie* a life estate into a fee, (y) and therefore a devise of "*all my hereditaments*" to A., without other words, gives him only an estate or interest for life in lands, it being then considered merely as denoting the *thing*, and not the *estate* or interest therein; (z) whereas a devise of "*all my estates*" might pass the fee simple. (a). It is a comprehensive term usual and proper in conveyances and wills, and in the latter will pass an advowson, (b) but it is much too general and uncertain to be adopted in pleadings, excepting in reference to a previous more particular description.

3. *Appendant and appurtenant*, "*appurtenances*" (cum *pertinentiis*.) These comprehensive terms, though different in their legal signification, are very frequently confounded. They are commonly used, the latter term particularly, in deeds and leases, with the intention to include all *things*, rights, and privileges not enumerated, but belonging to and used with the principal thing conveyed or demised, and intended to pass and to be enjoyed therewith, though not expressly named. But it is most prudent in deeds and leases, as well as wills, carefully and expressly to name in particular every thing intended to pass; for, at least in a *deed*, these words can in no case strictly pass any *corporeal* real property, (c) but only *incorporeal* easements, or rights and privileges, it being a general rule of law that under the word "*appendant*," or "*appurtenant*," in a *feoff-*

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2. Hereditaments.

3. "*Appendant*," "*appurtenant*," "*appurtenances*."

(u) See Macdonald's, Ch. B. observations on the term "*hereditaments*," 2 Bos. & Pul. 251, which it is submitted are also applicable to the term "*tenements*."

(x) Co. Lit. 5 b; 1 Thomas's Co. Lit. 219; 2 Bla. C. 17, quote 44, ante, 149, n. (b).

(y) Per Macdonald, Ch. B., 2 Bos. &

Pul. 251; and see 8 T. R. 503; 1 Thomas's Co. Lit. 219, note T.

(z) Id. ibid.; 5 T. R. 558; 8 Id. 503.

(a) Post, 159.

(b) Post. 351, ante, 151, note (r).

(c) Co. Lit. 121, l; 8 B. & Cres. 150.

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ment or *deed*, nothing can be conveyed that was itself *substantial, corporeal real property*, and capable of passing by feoffment and livery of seisin; and one kind of *corporeal* real property cannot be appendant or appurtenant to another description of the like real property: but only such things as can properly and consistently be appendant, or appurtenant, as common of pasture to land, or a way, or a pew to a house, &c. Thus land cannot, in the strict legal sense, be appendant or appurtenant to land or to a house, or other corporeal real property, nor *vice versa*. (d) This distinction is of great practical importance: thus, if a wharf, with the appurtenances, be demised, and the use of the water adjoining the wharf were intended to pass, yet no distress for rent of the demised premises could be made on a barge on the water, because it was not in a place that could pass as part of the thing demised. (e) In short, *appendants* are, technically speaking, those things (generally easements, such as commons, ways, &c.) which by *prescription* have belonged to another principal substantial thing, considered in law as more worthy; and strictly the principal thing and the appendant must be *appropriate* with each other in nature and quality, or, in other words, the principal and the accessory must be such as may *properly* and *reasonably* be enjoyed TOGETHER; and if a thing which may be appendant or appurtenant had always passed with a manor, to which it belongs by the words *cum pertinentiis*, it must be taken to be *appendant*. (f)

A thing *appurtenant* is that which may commence and be created at this day; as if the owner of a moor at this day grant to the owner of a manor and his heirs, common in such moor for his beasts *levant* and *couchant* upon his manor, or if he grant to another common of estovers or turbary in fee simple, to be burnt or spent in his houses within his manor; by such grants these commons become *appurtenant* to the manor, and shall pass by the grant thereof without other words, and are what was termed in the civil law "*adjunctum accessorium*," and by logicians "*adjunctum*." (g)

Again: it is laid down, that concerning things appendant and appurtenant, two things are implied, *first*, that prescription

(d) *Ante*, 153, n. (c); *Buzzard v. Capel*, 8 Bar. & Cres. 150; affirmed in error, 6 Bingh. 150, overruling 4 Bing. 137, and see judgment of K. B.

(e) *Id.* *ibid.*

(f) 1 Rol. 230, l. 27; 1 Co. Lit. by

Thomas, 206, 207. What may be annexed, 1 B. & Adol. 761.

(g) How appendant and appurtenant differ from that which is *part* or *parcel* of a thing, is explained in Judge Doderidge's *Treatise on Adowsons*, 38.

cannot make any thing appendant or appurtenant, unless there be the *propriety* of relation between the *principal* and the adjunct, which may be ascertained by considering whether they so *agree* in nature and quality as to be rationally capable of *union* without incongruity, for otherwise there will be no reasonable intendment in support of the prescription or rather of the original grant which it presumes. (*h*) Thus, why should a person grant to another as owner merely of *land*, without a house, a right to him and his heirs to sit in a pew in a church? since such a grant could only be reasonably made to the owner of a *house*; and, therefore, a person in general, can only claim a pew in respect of his ownership of a house in the parish. So, why should a grant of common of pasture be made to the owner of a house, *without any land* upon which he could keep cattle? consequently, a claim of common of pasture cannot be made merely in respect of the ownership of a house, but he must allege and prove the ownership of some land, or at least a curtilage. (*i*) So a thing corporeal cannot properly be appendant to a thing corporeal, nor a thing incorporeal to a thing incorporeal. But things incorporeal, which lie in grant, as an advowson, a right of common, and the like, may be appendant to things corporeal, as to a manor, house, or lands. So things corporeal may be appendant to things incorporeal, as lands to an office. Therefore the appendant must be *appropriate* in nature and quality with the thing to which it is to append; consequently, common of turbary or of estovers cannot be appendant or appurtenant to *land*, but to a *house* to be spent there; nor can a leet that is temporal property be appendant to a church or chapel which is ecclesiastical. Neither can a seat in a church by prescription be claimed as appendant or belonging to land, but to a house. (*j*) *Secondly*, nothing can be properly ap-

(*h*) In Co. Lit. 121, b, it is said that prescription doth not make any thing appendant or appurtenant, unless the thing appendant or appurtenant *agree* in quality and nature to the thing whereunto it is appendant or appurtenant: as a thing corporeal cannot properly be appendant to a thing corporeal, nor a thing incorporeal to a thing incorporeal. Mr. Butler, in his note to this passage, after adverting to some examples to show that this position is not universally true, says: "The true test seems to be the propriety of relation between the principal and the adjunct, which may be found out by considering whether they so *agree in nature and quality* as to be capable of union without any incongruity." See quotations in *Buzzard v. Capel*, 8 B. &

Cres. 145. But this expression, "*agree*," must not be considered as was argued in that case, to import that the two things are to be of the *same nature*, but rather the *reverse*, and the term "*appropriate*" seems preferable; and all that is required seems to be, that the adjunct be that description of incorporeal easement or privilege that will naturally be advantageous to enjoy with the principal, and therefore the natural object of a separate grant supposed to have been made.

(*i*) 5 T. R. 46; see note, *infra*.

(*j*) *Ante*, 154; Co. Lit. by Thomas, 1 vol. 206, 207; 1 Vent. 386; Co. Lit. 121, b, note (7); and see Willes's Rep. 227, 231, as to rights of common, appendant and appurtenant. The case of *Scholes*

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pendant or appurtenant to any thing, unless the *principal* or superior thing be of *perpetual* subsistence and continuance. Thus, an advowson, which is said to be appendant to a manor generally, is in truth appendant to the *corporeal demesnes* of the manor, which are of perpetual subsistence and continuance, and not to any rents or services, which are subject to extinguishment and destruction. (*k*)

Apportionment. Most appendants and appurtenances which are capable of subdivision, without injustice or inconvenience, may be *apportioned and divided*, as rights of common of pasture for commonable cattle *levant and couchant*, when a part of the land is sold off; and so may be the right to sit in a pew when a mansion-house has been divided into two or more. (*l*)

Severance
and in gross.

Some *appendants* may be *severed* from the principal, and they then become rights in *gross*; and this may be effected either by a separate conveyance of the principal, excepting the appendant, or by a separate grant of the appendant; and this frequently occurs in cases of advowsons appendant. (*m*) When once the principal and appendant have been separated by either of these means, the appendant, in general, never afterwards can be appendant, but continues in *gross*, though there are a few exceptions to that rule. (*n*)

Extinguishment
and words sufficient to create a
fresh grant.

Some appendants and appurtenances also may be *extinguished* and destroyed, as by unity of *seisin*, (sometimes improperly termed unity of *possession*.) (*o*) As if a person have common of pasture appendant to his estate on a waste or other land, and by purchase or descent he becomes also owner in fee of the latter; the right of common is destroyed, because the minor right of common is merged in the superior entire right to the soil, and it would be absurd to claim an easement in one's own land. (*p*)—In such a case, upon a subsequent severance in the ownership of the two estates, there should be an express *new*

v. Hargreave, 5 T. R. 46, where it was held that common for cattle *levant and couchant* cannot in point of law be claimed by prescription, as appurtenant merely to a house, without any curtilage or land, is illustrative of this position.

(*k*) *Dyer*, 70, b; 2 *Leonard*, 222; *Co. Lit.* by Thomas, 1 vol. 207.

(*l*) 4 *Coke*, 37; 8 *Coke*, 79, a; *Willes*, 222, 322; and *per Taunton, J.*, 2 *Bar. & Adolp.* 168; see *post*, common of pasture appendant or appurtenant and pews. What annexations cannot be disannexed, 1 *B. & Adol.* 761.

(*m*) 1 *Roll.* 252, b. 48; *Co. Lit.* by Thomas, 1 vol. 208; 2 *Bla. C.* 22.

(*n*) 2 *Mod.* 2; 2 *T. R.* 415; *Co. Lit.*

by Thomas, 1 vol. 208.

(*o*) Unity of *possession* only *suspends* prescription, and affects the form of pleading, *Co. Lit.* 114, b; *Vin. Ab. Extinguishment*, C. pl. 32; but unity of *seisin* in *fee* merges or destroys the prescription, *Id.*; *Com. Dig. Suspension*, B.; *Vin. Ab. Extinguishment*, C.; 1 *East*, 377; 2 *Peake's C. N. P.* 152. When no merger, in case of an *interesse termini*, 5 *Bar. & C.* 111; *Co. Lit.* by Thomas, *Index*.

(*p*) *Coulton v. Slack*, 15 *East*, 108; *Com. Dig. Suspension*, B.; *Vin. Ab. Extinguishment*, C.; *Co. Lit.* 114, b; 1 *East*, 377; see 2 *Bla. Com.* by Clitty, 35, note (35), as to extinguishment.

grant of the right of common or way, or other former appendant; for otherwise, at law, the right to the easement would be lost; though if the new conveyance be of all commons, ways, &c. *used* with the estate conveyed, those words would operate as a new grant, and the benefit of the right of easement would be in effect continued, or rather granted *de novo*; and after long user, (as twenty years' uninterrupted user,) a proper new grant would be inferred. (q) In leases and other deeds expressing that the lessee or grantee shall have "all commons, ways, &c. *before used or enjoyed*, &c.," the courts will, in general, give effect to such words, so as to continue the benefit of the commons or ways, &c., although no longer strictly appendant or appurtenant; but if there be no such words they cannot assist; (r) and in that case recourse must be had to a Court of Equity to *reform* the deed according to the intention of the parties.

But neither a grant nor a prescriptive right will be extinguished or prejudiced by the pulling down and rebuilding a house or other corporeal thing to which an incorporeal thing is appendant or appurtenant, for the substituted building will retain the same rights and privileges as the ancient had. (s) So, provided after any alteration the enjoyment of the rights be substantially the same, no objection can be made to the alteration, and slight alterations are permitted. (t) Thus, a prescription to use water for *fulling mills*, will sustain an employment of it for the purpose of *corn mills*, and the owner is not bound to use the water in the same precise manner, or to apply it to the same mill, for if he were, that would even stop all improvement in machinery. (l) And if an ancient house be pulled down, it should seem that a new house built on the same estate, though not on precisely the same site, would be entitled to the ancient appurtenances. (u) The precise meaning of the terms "appendant," "appurtenant," and "in gross," will be further shown when we consider rights of common and of way. (x)

The term "*appurtenances*," commonly used in deeds, is too general and indefinite to be adopted in pleading, unless in connection with some previously particularized corporeal thing, as "land with the appurtenances." Some cases have been re-

What alteration in the principal thing does not prejudice the appendant.

Appurtenances.

(q) *Cowlan v. Slack*, 15 East, 108; *Morris v. Edgington*, 3 Taunt. 24; 2 & 3 W. 4, c. 71.

(r) 15 East, 108; 3 Taunt. 24; 1 Dowl. & R. 506; 5 B. & Ald. 830; but see 2 B. & Cres. 100; 3 Dowl. & R. 287, S. C.; 5 Taunt. 548, *post*.

(s) 9 B. & Cres. 671; 2 Vern. 146; 2 B. & Adolph. 164; 1 Campb. 322; 3

Campb. 81, *post*, "Ancient Windows."

(t) *Id. ibid.*; 6 Bing. 379; 4 Co. 87; 1 B. & Ald. 258; 2 B. & Cres. 910.

(u) *Id. ibid.*; 9 B. & Cres. 671.

(x) *Post*; and see Willes's Rep. 227 to 231, 322; 2 Inst. 86; Cro. Car. 482; Yelv. 159; 1 Bulstr. 47; 2 Bla. C. 32, 33—35, in notes.

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ferred to as importing that the words "*with the appurtenances*," in a *deed*, may have the effect of passing adjacent corporeal real property, as buildings, gardens, &c. adjoining to a house; and that therefore in a *deed*, as a feoffment "of a house *with the appurtenances*," not only the house itself, but also the *buildings* adjoining, with its orchard, garden, curtilage, and close immediately adjoining to the house, and on which the house was built, will pass; though not any other land at a distance, although usually occupied with the house. (y) But on examination it will be found, that in these cases no such effect could have been legally given to such words, because under the word "*appurtenant*," no buildings, or land, or other *corporeal* property can legally pass; and the effect was given in those cases entirely to the words "*messuage*" or *house*, by either of which words alone, and without more, adjoining buildings, and an orchard, garden, and curtilage, may pass. (z)

So under a *devise* of "a *messuage* with the appurtenances," much effect has been supposed to have been given to the latter words, though perhaps there was no occasion to resort to them. (a) Thus, under those words, it has been holden that not only the house passed, but also land occupied with the same, and highly convenient for the use of it, though held for a different term, that being the inferred intention of the testator; (b) but land occupied with a house will not pass under such a devise, unless it clearly appear that the testator meant to extend the word "appurtenances" beyond its technical sense. (c) And it was held in a recent case, that a devise of "all my capital messuage or mansion-house wherein *I now live*, and the buildings, gardens, grounds, and appurtenances to the same belonging, or therewith used," would not include two cottages of the testator on the side of the road opposite to the messuage, which were let out to *tenants*. (d)

It should seem, that in construing *deeds* and leases, (which are usually prepared by professional men, and with care,) no effect should be given to the words "appendant or appurtenant" beyond their strict legal meaning; but that those words in a will may be justly regarded and expounded as intended by the tes-

(y) Shep. T. 94; and see cases, 2 Saund. 401, note (2); and 1 Bar. & Cres. 350; 15 East, 109; 3 Taunt. 24, 147; 1 B. & P. 53; 2 T. R. 498, 502; 3 M. & S. 171; 5 Bar. & Cres. 156, as to the effect of the word "*appurtenances*."

(z) Co. Lit. 5, b, 56, b; 2 Co. 32, a; 1 Thomas's Co. Lit. 215, b.; and Id., note (35).

(a) See several cases collected in 1 Thomas's Co. Lit. 215, note 35.

(b) 2 Blac. R. 1146; see observations in 1 Thomas's Co. Lit. 215, note (35).

(c) 1 Bos. & P. 53; 2 Saund. 401; 9 East, 458; 1 Thomas's Co. Lit. 215, note (35).

(d) 2 Sim. 150, 151.

tator as his expressions of desire, that all things, whether corporeal or incorporeal, *usually enjoyed* with the principal thing devised, should pass.

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4. *Estate*. This term is used in two senses; the first and proper meaning is the degree, quantity, nature, and *extent* of the *interest* in real property; as, an estate in fee, whether simple or in tail; or an estate for life, or for years. Secondly, the description of the thing itself, as "my estate at B.," when the party, whether in a deed or will, may merely refer to the land or thing, without regard to the extent or nature of his *interest* therein. (e) The distinction is most important. It was formerly considered that where the word "estate" had been used as descriptive of the property, as "my estate at A.," it would only pass a life interest to the devisee; (f) but, according to later decisions, the word "*estate*" in a will generally passes the *fee* to the devisee, if not restrained by other words; and that word used in the operative clause of a will, although referring also to locality, as "my estate at B.," passes the fee simple, unless there is in the will other matter to controul that signification; (g) and "personal estates" will carry freeholds, if such intention appear by the will. (h) Whereas, in these cases, if the term "*messuage*," or other name merely descriptive of the real property, had been inserted, instead of the word "*estate*," then only a life interest would have passed to the devisee; and we have seen that the word "*hereditaments*" in a will only passes a life estate. (i)

4. Estate.

5. The word "*Term*" also in a lease may signify either the *time*, or the estate, or thing, granted or demised. (k) It does not always signify the *time* specified in the lease; and, therefore, if A. grant a lease to B. for the *term* of three years, and, after the expiration of the said *term*, to C. for six years, and B. surrender or forfeit his lease at the end of *one* year, C.'s interest shall *immediately* take effect; but if the remainder had been to C. from and after the expiration of the said *three years*, or from and after the expiration of the said *time*, in that case C.'s interest would not commence till the *time* had fully elapsed, whatever might have become of B.'s *term*. (l)

5. Term.

(e) See further *post*, and the lucid general observations of Tindal, *C. J.* in 8 Bing. 328, 329, as to the effect of the word *estate* in a will.

(f) 2 P. Wms. 335; And. R. 210; 11 East, 220.

(g) 8 Bing. 328, 329; 7 East, 259, 299; 4 Maule & S. 366; 2 T. R. 656; 2 Chit. R. 558; 6 Taunt. 410; 2 Marsh.

113; 3 Moore, 565; 1 Bro. & B. 72; 4 Taunt. 176.

(h) 11 East, 246; see 6 T. R. 610.

(i) *Supra*, note (g); and see as to an advowson, 3 Brod. & B. 27.

(k) 4 B. & Cres. 261; 2 B. & Cres. 216; 1 Burr. 282.

(l) Co. Lit. 45.

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6. Farm.

6. *Farm*, in common acceptation, and for the purpose of description in a deed, means a messuage with outbuildings, garden, orchards, yards and land, usually occupied with the same for agricultural purposes; (*m*). But in law, and especially in the description in a declaration in ejectment, it being derived from the Latin *firmā*, denotes the *leasehold interest* for years in any real property, and means any thing which is *held* by a person who stands in relation of a tenant to a landlord, and does not mean a *farm*, in common acceptation, as descriptive of the land, &c. (*n*) The word "farm" or "farms" in a will may be sufficient to pass a freehold, and copyhold, and leasehold estate, if it appear to have been the testator's intention that it should so pass; (*o*) and the devise of goods and chattels and stock of a farm will pass the growing crops to the devisee; (*p*) though a devise of a farm will not pass the farming utensils thereon. (*q*)

7. Close.

7. The term *close*, in common parlance, means a field enclosed all round with hedges or fences, but in law it rather signifies the separate and exclusive *interest* of a party in a particular spot of land, whether inclosed or not; and in that legal sense the same may be in an open common, field, or waste, containing the lands of several persons, without any intervening fence, though usually marked out by certain boundaries or landmarks; (*r*) for which reason it has been considered that ejectment for a close, or croft, or piece of land generally, is too uncertain. (*s*) The term "close," in popular meaning, is that in which it is used in an action of trespass *quare clausum fregit*; and in modern times the term "close," without stating any name or number of acres, would probably be holden a sufficient description in ejectment, though it is more usual to claim land by the description of so many acres of arable land, &c. (*t*)

8. Field.

8. It should seem also that the term "*field*" would be considered as certain a description as that of close, and might be used, but it is not a usual description in legal proceedings. It is, however, expressly named in the general act against larceny, where it is enacted that the stealing, to the value of ten shillings, any goods or article of silk, &c. whilst laid in progress of manufacture in any building, *field*, or other place, shall be felony. (*u*)

(*m*) Plowd. 195; Shep. Touch, 93; 1 Thomas's Co. Lit. 208; 209, note N.

(*n*) 6 T. R. 353; 2 Bla. C. 317, 318; 2 Chit. Plead. 879, note (*e*).

(*o*) 6 T. R. 345; 9 East, 448; Bro. Grant, 135.

(*p*) 6 East, 604, note; 8 East, 339.

(*q*) *Ante*, 112; 11 Ves. 657.

(*r*) 7 East, 207; Doct. & Student, 30.

(*s*) See cases cited Tidd, 9th ed. 1191; *sed quare*.

(*t*) 11 Coke, 55; Cro. J. 435; 3 Mod. 98; Cowp. 349.

(*u*) 7 & 8 Geo. 4, c. 29, s. 16.

9. *Emblements*, or growing annual crops, produced or improved by care and industry, we have seen, are, whilst growing, considered, for many purposes, part of the realty, and, unless expressly excepted in a conveyance, would pass to the purchaser as part of the land, in the same manner as fixtures. (x) But as for the most part these are personal estate, and may be taken in execution as *fructus industriales*, and, upon death even of a tenant in fee, belong to his executor, and not to his heir, we have classed them as personal property. (y) A farmer cannot be rated to the poor in respect of his crops or farming stock, because the annual profits of the land in the aggregate having been already rated, the profits of the stock cannot be also separately rated, they having already been virtually assessed in those of the land. (z) Crops sold by a mortgagor belong to, and may be seized and sold by the mortgagee after recovery in ejectment, or even without ejectment, if he can get possession peaceably, or he may maintain trover against a person who takes the crops; (a) and if a lessee sow corn, and commit a forfeiture of his lease, the landlord is entitled to the same. (b)

10. *Fixture* is a term in general denoting the very reverse of the name. It is something not originally constructed as part of a building, but formerly a moveable chattel, and afterwards annexed to the building or land for the more convenient enjoyment thereof, and which, at the will of the owner, is at all times readily capable of being removed, though at the time annexed. We have fully considered these in stating the different descriptions of personal property, and there shown when it becomes part of the realty and passes as such. (c) Questions relating to fixtures arise between the heir and an executor, or the executor and remainder-man, or a landlord and tenant, whether, in trade, for agricultural purposes, or for ordinary habitation, and whether or not affected by covenant. Between the heir and the executor, the rule is more strict in favour of the heir than that as between landlord and tenant, and almost every annexation intended for the permanent improvement or better enjoyment of the premises is not removeable, but belongs to the heir. But some things put up by a tenant for life will go to the executor, and not to the remainder-man; and, as between landlord and tenant for agricultural or ordinary purposes, the rule has

(x) See *infra*, Fixtures.(y) See *ante*, 91 to 94.

(z) 2 Ld. Raym. 1280; Burp, J. Poor,

64.

(a) 1 Price, 53; 3 Bing. 11.

(b) *Davis v. Eylon*, 7 Bing. 154.(c) *Ante*, 94; 3 Thomas, Co. Lit. 225, 224, note 3; and see *post*.

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been relaxed in modern times in favour of the tenant; and it has even been held that a *pump* erected by an ordinary tenant, and very slightly affixed to the freehold, is removeable as a tenant's fixture; and stoves, grates, ornamental chimney-pieces, wainscots fastened with screws, coppers, and various other articles, are now clearly removeable by *any* tenant, if they can be separated without injury to the landlord; (d) and tenants may remove any building or annexation for the purposes of *trade*, unless restrained by express covenant. (e)

Fixtures of every description, when annexed to any building whatever, or in squares, or fixed in land, or in the possession of tenants, are, as regards *criminal* injuries, now specially protected by recent acts. (g) The 7 & 8 Geo. 4, c. 29, s. 44, enacts, "That if any person shall steal, or rip, cut, or break, with intent to steal, any glass or wood-work, belonging to any building whatsoever, or any lead, iron, copper, brass, or other metal, or any utensil or fixture, whether made of metal or other material, respectively fixed in or to any building whatsoever, or any thing made of metal fixed in any land being private property, or for a fence to any dwelling-house, garden, or arca, or in any square, street, or other place dedicated to public use or ornament, every such offender shall be guilty of felony, and shall be liable to be punished in the same manner as in the case of simple larceny; and in case of any such thing fixed in any square, street, or other like place, it shall not be necessary to allege the same to be the property of any person." The prior statutes, 4 Geo. 2, c. 32, and 21 Geo. 3, c. 68, relating to this offence, are repealed by 7 & 8 Geo. 4, c. 27. This enactment extends the offence much further than the prior acts did, as it includes all utensils and fixtures, of whatever material made, either fixed to buildings or in land, or in a square or street. A church, (h) and, indeed, all buildings, (i) are within the Act. An indictment, therefore, for stealing lead fixed to a certain building, without further description, will suffice; (i) and there is a general provision rendering persons liable summarily to the extent of 5*l.* before a magistrate, for any wilful or malicious injury to any building

(d) 6 Bing. 437.

(e) See more fully *ante*, 94; and see in general, Amos on Fixtures. According to the reasoning of Dr. A. Smith in his *Wealth of Nations*, all annexations for purposes of *agriculture* ought to be equally removeable as when made for purposes of *trade*, but that principle has not been as yet judicially established. *Elwes v. Mawe*,

3 East, 38; see *post*, 174, tit. "*Improvement*."

(g) 7 & 8 Geo. 4, c. 29, s. 44; as to *stealing* fixtures to buildings, or in land, and as to larceny thereof by lodgers, *id.* 45; and as to malicious injuries, see 7 & 8 Geo. 4, c. 30.

(h) 1 East, P. C. 592.

(i) R. & R. C. C. 69.

or property, whether public or private, and which extends to every injury to any fixture. (*k*)

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We now proceed to consider the various kinds of *Corporeal real property* with their respective properties and incidents, and the laws for their regulation and protection, and then we will consider the various kinds of *Incorporeal real property*. The former are principally rectories, vicarages, glebe land, churches and chapels, church-yards and monuments, manors with their wastes, messuages and dwelling-houses; other buildings and erections, improvements, curtilages, areas, yards, gardens and orchards, nursery-grounds, hothouses, greenhouses, conservatories, land, acres more or less, prima tonsura, aftermath, beest-gates, cattle-gates, sheepwalks, and wayleaves, when of *exclusive* enjoyment; hedges, fences and ditches, woods and underwoods, trees when growing, mines, forests, chases, purlieus, and inclosed grounds for deer, freewarren, warrens, and grounds for breeding conies, preserves, game, decoys, rookeries, land covered with water of every description, whether ponds, water-courses, rivulets, rivers, water and fish, and fisheries therein, dams of fish-ponds, and private fisheries and mill-ponds, and oyster beds, layings, or fisheries. We will then consider a few kinds of corporeal real property, more of a *public nature*; as sea banks and walls, ports and harbours, lighthouses, beacons, and sea marks, rivers, creeks, and canals, quays, docks, and wharfs, rail roads, highways, bridges, toll-houses, turnpike gates, and weighing engines, and in most of which particular individuals may have a *private* interest.

First. The several kinds of Corporeal real property enumerated and considered. (l)

1. A *Rectory*, consisting of a church, glebe lands, and tithes, is at common law considered to be *corporeal* real property, and ejectment is sustainable for the same, because it includes several substantial and visible things, and in that respect resembles a manor, the church being compared to the mansion-house, the glebe lands to the demesnes, and the tithes to the services. (*m*) But an ejectment is not sustainable for an *advowson* in *gross*, that being merely an incorporeal intangible right to present to an ecclesiastical benefice, and therefore the disturbance of the right is only remediable by *quare impedit*; (*n*) though after a clerk has been inducted, and is in full possession of his church and his parsonage and glebe, if he be

1. Rectory or vicarage, glebe lands, &c.

(*k*) 7 & 8 Geo. 4, c. 30, s. 24.
(*l*) For the fullest ancient information on each of these, the works referred to in 1 Thomas Co. Lit. 249, note 44, should be examined.

(*m*) 8 Bar. & Cæs. 25; 2 Man. & Ry. 104, S. C.; as to *Advowsons*, see *post*.
(*n*) Cro. Jac. 146; 3 Bla. C. 246; see 2 Wills. 116, *ante*, 150; see *post*, "*Advowsons*."

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evicted or trespassed upon, he may then sustain ejectment or trespass. (o) When the church is full, that is, when there has been a presentation, institution, and induction of a competent clerk, then *quare impedit* is the proper remedy at the suit of a person who asserts that he ought to hold; but if the clerk were so presented, instituted, and inducted, in consequence of a simoniacal void bargain, then the church is not to be considered full; and the clerk lawfully presented by the king, or bishop, or other lawful patron, may support ejectment against the person who had been so simoniacally presented, and who had obtained possession of the church under colour thereof. (p) The glebe belonging to a parsonage or vicarage cannot be extended under an elegit, (q) &c. By the grant of a "rectory" or "parsonage," without other words, the house, the glebe, the tithes, and the offerings belonging to it, will pass. And by the grant of a "vicarage," every thing belonging to it, as the vicarage house, &c. will pass. (r) In the description in fines, parsonages, rectories, advowsons, or tithes impropriate, will not pass by the names of the "advowson of the church," but by the words "the rectory of the church of S. with the appurtenances." But when the fine is of a presentation to a church only, it must be of the "advowson of the church," and not "with the appurtenances;" and of all vicarages endowed the writ must be of the "advowson of the vicarage of the church of S.," and not "with the appurtenances;" and where no vicarage is endowed, it must pass under the words, "the advowson of the church of S.," &c. (s)

2. Church, chapel, and churchyard.

2. A church or chapel, and churchyard, are terms expressly recognised as in themselves correct technical descriptions of the building and place, even in criminal proceedings; (t) and therefore, though it was formerly considered that a church must be described as a messuage, or as *domus Dei*, or as the mansion-house of God, (u) they may now be described in ejectment and in criminal proceedings as a church or chapel, according to the common acceptance; (x) and a parson has a sufficient interest

(o) 12 Mod. 420, 433; 8 B. & Cres. 25; 3 Bla. C. 252, 253.

(p) 8 B. & Cres. 25.

(q) Gilb. Exec. 39; Tidd, 9, ed. 1035.

(r) Shep. T. 93, 94; Bro. Grant.

(s) Id. 12, post, "Advowson."

(t) 7 & 8 Geo. 4, c. 29, s. 30, 31.

(u) 3 Inst. 64; 1 Chit. Rep. 537; 11 Co. 26; see form of indictment for breaking church windows, upon which the party was at sessions convicted and punished;

2 Chit. Cr. L. 23. *Sed quere*, whether, however indecorous, the act was more than a trespass. Mr. Knapp, a very eminent crown lawyer, considered it to be no punishable offence.

(x) 8 Bar. & Cres. 25; 1 Salk. 256; 11 Co. 25, b; 2 Esp. R. 5, 28. Perhaps ejectment lies for a place called the Vestry in D., or for a prebendal stall after collation, 3 Lev. 96; 1 Wils. 11, 14; Adams's Eject. 3 ed. 19; and see post, 168, notes (p) (q).

therein to enable him to support *trespass* against a person for preaching in his church without his leave, (y) although the right of advowson is strictly an incorporeal right, and in respect of which no action of trespass could be sustained. The freehold of the church and churchyard are considered to be vested in the parson for the time being, and he may in general sustain trespass for any injury thereto; (z) but he can convey no freehold right therein either for burial or otherwise, unless by deed under seal; (a) and a grant of part of the *chancel* of a church by a lay impropiator in fee, is not valid in law, and therefore the grantee could not sustain trespass for pulling down his pews there erected. (b) But as to *tombstones* placed in a churchyard by leave of the parson, trespass, not case, is the proper remedy by the person who so placed the same, against a wrong-doer for removing it. (c) The parson is considered as having the freehold of the church and of the soil of the churchyard, and he may bring trespass against such as dig and disturb it; (d) and a parson is in right of his freehold in his church entitled to vote in the election of members of parliament. The statutes 7 & 8 Geo. 4, c. 29, and 30, particularly protect churches from offences in the nature of larceny, termed sacrilege, and from wilful and malicious injuries. (e)

3. The *heir* has a property in the *monuments* and tombstones in the church or churchyard, and the escutcheons and coat armour of his ancestor there hung up, with the pennons and other ensigns of honour suitable to his degree; and if the parson or any other take them away or deface them, he is liable to an action of trespass from the heir; (g) but the heir has no property in the bodies or ashes of his ancestors, nor can he bring any civil action against such as indecently at least, if not impiously, violate and disturb their remains when dead and buried; (h) but the offence of disinterring and selling a dead body is indictable as a misdemeanor at common law; (i) and the power to take dead persons for dissection is now regulated by a recent act. (k) And at common law, if any one, in taking up a dead body, steal the shroud or other apparel, it is felony,

3. Monuments.
(f)

(y) 12 Mod. 420, 433.
(z) 3 Bing. 136; 2 Car. & P. 34; 2 B. & A. 478; 1 East, 244.

(a) 5 Bar. & Cres. 221; 8 Bar. & Cres. 293; 7 Bing. 687.

(b) 1 Bar. & Ald. 498.

(c) 3 Bing. 136; 2 Car. & P. 34.

(d) 2 Bla. C. 429.

(e) See observations, *post*.

(f) *Ante*, 50 to 52 and 95, and *supra*, note (c).

(g) 3 Bing. 136; 12 Co. 105; Co. Lit. 18, b; 2 Bla. C. 428, 429; *ante*, 50, 51, 52, *Right of Burial*.

(h) 2 Bla. C. 429.

(i) 2 T. R. 733; 2 Leach, 560, S. C.

(k) 2 & 3 W. 4, c. 75.

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for the property thereof remains in the executor or whoever was at the charge of the funeral. *(l)* A monument cannot be placed in any particular part of a church or churchyard without the rector's consent. *(m)* And where a testator devised his real estates to sell and expend 2000*l.* in erecting a monument in the parish church of St. John, Southwark, and 21*l.* to the rector, on condition of his permitting such erection, and 100*l.* to Dr. Johnson for writing an epitaph, it was held that this was not a devise within the statute of mortmain; and that as the purpose failed by the rector's refusing for many years to allow the monument to be erected, though a succeeding rector was willing to consent, the heir of the testator was entitled to the 2000*l.* and the 21*l.* *(n)*

4. Manor. *(o)*

4. A *manor*, so described, without any other terms, is considered *corporeal* property, and ejectment for it by that name, without other description, is sustainable, it being inferred that besides the incorporeal manorial rights of service, such as quit rent, &c. there is a mansion and demesne lauds; *(p)* and yet there may be a manor by reputation, although extinct for the principal purposes by defect of suitors, but sufficient to enable the claimant to appoint a gamekeeper, although there be no demesne lands, or other tangible incorporeal property, nor even any freehold suitors left; *(q)* but as the term "manor" may denote a mere franchise and right to hold courts, and have suit and service rendered or quit rents paid by copyholders and others, it has therefore been contended that ejectment is not sustainable for a manor generally, and that the quantity and nature of the land, or other tangible property therein, for which an ejectment properly lies, ought also to be stated; *(r)* and the latter mode of declaring in ejectment for a manor is certainly now more usually adopted. *(s)* It is clear that a lord of a manor, in case of an inclosure, is entitled to an allotment, not only in respect of his demesne lands, but also in respect of his mere right of franchise as lord of the manor. *(t)* It should seem that a manor is not *eo nomine* rateable to the poor under the 43 Eliz. c. 3, s. 2, which, speaking of property, enumerates

(l) 3 Inst. 110; 12 Co. 113; 1 Hale, P. C. 515; 2 Bla. C. 429.

(m) *Ante*, 50, 51, 52, Burial.

(n) *Mellick v. President Asylum*, Jacob's Rep. 180.

(o) See *post*, Quit Rents; and see 3 Thomas, Co. Lit. Index tit. Manor; and 1 Id. 659, G.

(p) Latch. 61; Lil. R. 301; Run. Eject. 2 ed. and Adams's Eject. 3 ed. 29;

and see 8 Bar. & Cres. 25, *ante*, 163.

(q) 10 East, 259. New freehold suitors cannot be created by the lord's granting parts of his demesne lands, so as to revive the courts; Willes, 614.

(r) Latch. 61; Lil. R. 301; Hetl. 146; Selw. N. P. 4 ed. 665.

(s) 2 Chit. Pl. 878.

(t) 2 M. & S. 440.

occupiers of "*lands and houses*," and therefore a lord of a manor is not rateable for the quit rents and casual profits of the manor, and indeed if he were, the property, or at least the quit rents, would be rated twice; viz. in his hands as lord of the manor, and also in the hands of his tenant.^(u) The word "manor" in a deed, without the words "with the appurtenances," pass all that is at the time of the grant parcel of the manor and all its perquisites. ^(x)

5. The wastes and commons of a manor in every respect resemble the private lands of a freeholder, excepting that they are usually not inclosed and are subject to certain easements, such as rights of common, of various descriptions, over the same. In every other respect the lord of the manor may treat them as his "*closes*," and support trespass for entering his close even against a commoner, if he enter for any other purpose than in the legal exercise of his right of common.^(y) He has a right to inclose and approve, provided he leave a sufficiency of common, but not otherwise unless by special custom.^(z) But such new inclosures cannot, without special custom, be granted out, either as copyhold,^(a) or as long leasehold.^(b) The recent act especially declares, that a lord of a manor shall be exclusively entitled to the game on the wastes and commons.^(c) But a lord of a manor as such can legally sport only over his own demesne lands, and wastes, and commons; and he has no right in that character, either himself, or by his gamekeeper, to enter the lands of freeholders or copyholders, or their tenants, within his manor.^(d)

5. The wastes and commons of the manor.

6. The terms, "*mansion*," "*dwelling-house*," "*house*," "*messuage*," and "*burgage*," (in a borough,^(e)) are, in general, synonymous, and any distinction between the terms, "*messuage*," or "*house*," in their legal import, has been justly refuted.^(f) A *cottage* is the same in law, but importing a smaller and inferior building, at one time prohibited, but now to be encouraged.^(g) By the grant of a cottage, it is said, passes a small dwelling house, that hath no land belonging to

6. Mansion, dwelling-house, house, messuage, or burgage.

(u) 2 Burr. 991; 1 East's R. 534; Burn's J. Poor, 63, in notes; id. 70.

(x) Shep. T. 92.

(y) See per Bayley, J., 7 B. & Cres. 364, 365, 369.

(z) 7 B. & Cres. 369, 372, 373; 3 T. R. 443.

(a) 7 B. & Cres. 346.

(b) Id. ibid.

(c) 1 & 2 W. 4, c. 32, s. 10.

(d) 11 Mod. 74; 10 East, 189; 2 Bla. C. 39, 419.

(e) Hard. 173; Poph. 203; 1 Sid. 295.

(f) 2 T. R. 502; 1 Thomas's Co. Lit. 215, n. 35; but see cases cited 9 B. & Cres. 681.

(g) 1 Thomas's Co. Lit. 216.

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it.(h) These terms are respectively very comprehensive, for by a conveyance of a "messuage," or "house," without other words, other adjacent buildings, curtilage, orchard, garden and even an acre or more of land, would pass.(i) For criminal purposes it is essential that the building should have been *used* for residence and sleeping therein;(k) and though to subject the building to assessment towards the relief of the poor, or to the assessed taxes, a very slight and occasional occupation is sufficient;(l) yet to acquire a settlement, a *bonâ fide* occupation is essential.(m) The term, "messuage," it is said, includes a church, and that a church or chapel ought to be described as a messuage, in legal proceedings, to recover the possession,(n) though we have seen that now they might properly be described by their usual name, as in indictments for sacrilege.(o) And, indeed, it seems the better opinion that they could not be treated as a dwelling-house, so as to render the stealing from the same technically *burglary*;(p) and the 7 & 8 Geo. 4, c. 29, s. 11, in describing burglary, merely mentions "*dwelling-houses*," and as there is an express clause for stealing chattels in a church or chapel, it seems clear that a church or chapel cannot be treated as a dwelling-house, as regards the offence of burglary.(q)

The term "*mansion-house*," in its common sense, not only includes the dwelling-house, but also all out-houses, as barn, stable, cow-house, dairy-house, if they be parcel of the mansion, though they be not under the same roof or joining contiguous to it.(r) By a devise of "messuages with all houses, barns, stables, stalls, &c. that stand upon or belong to the said messuages;" even the lands belonging to the messuages will pass;(s) and where a person being tenant for years of a house, garden, stables, and coal-pen, bequeathed in these words, "I give the *house* I live in, and garden to B." it was held that the stables and coal-pen, occupied by the testator, together with the house, passed without being expressly named, though the testator used them for the purposes of trade

(h) Shep. T. 94.

(i) Co. Lit. 56, b. n. (1) Hargrave; 1 Thomas's Co. Lit. 5, b. note (1); 2. Id. 215, 216; and note (35) as to the large import of the word *messuage*.

(k) *Rex v. Martin*, Russ. & R. C. C. 108; 1 Leach, 185; 2 East, P. C. 498; 8 B. & C. 461.

(l) 4 T. R. 477; 10 East, 554; Burn's J. Poor, 51; tit. Taxes.

(m) Burn's J. Poor, 574.

(n) 11 Coke, 26; 2 Esp. N. P. 528; 1 Salk, 256; 8 B. & C. 25.

(o) 7 & 8 Geo. 4, c. 29, *ante*, 164.

(p) Hawk. P. C., B. 1, c. 38, s. 17.

(q) 7 & 8 Geo. 4, c. 29, s. 10. It is also to be observed, that *money* is not mentioned in that clause.

(r) 1 Hale, P. C. 558, 559; Burn's J. Burglary; see also, 1 Thomas's Co. Lit. 215, 216.

(s) 3 Wils. 141; 2 Bla. R. 726.

as well as for the convenience of his house; (t) and under a devise of "all his messuage, or dwelling-house, in High-street, and all and every his buildings and hereditaments in the same street," it was held that not only the house in that street, but two cottages in an *adjoining* back street passed, the communication being from the former, and the testator having only one messuage in High-street. (u) But it is said that the leading distinction between *buildings* and *land* is this, that by the name of a "castle," "messuage," "toft," "croft," or the like, nothing else will pass, except what falls with the utmost propriety under the terms made use of; but that by the name of *land*, which is *nomen generallissimum*, every thing terrestrial will pass. (x) *Fixtures* annexed to a *messuage*, building, or land, have already been considered. (y) We may here notice that by a conveyance of a "messuage with the appurtenances," fixtures usually removeable will pass to the purchaser, unless disannexed and removed before the conveyance has been executed. (z) A conveyance or demise of a messuage would impliedly pass every part under the same roof, but not so if it be proved that at the time of the demise a room was separated by a wooden partition, and had not been occupied with it for many years. (a)

With respect to the criminal law, and the offence of *burglary*, it can only be committed in a "*dwelling-house*," or a building *part thereof*, having a communication between such building and the dwelling-house, either immediate or by means of a *covered and enclosed* passage leading from one to the other." (b) It must be a *finished* building intended as a house, and actually used and inhabited as such, and not a mere intended house, (c) for the capital punishment of burglary was intended to protect, not merely property, but the actual occupant from the terror of disturbance during the hours of darkness and repose. (d) But any *permanent* building, ordinarily used for residence and sleeping, may be a "*dwelling-house*," as respects the offence of burglary; as *chambers* in an inn of court, (e) a *loft* over a stable, used as the abode of a coachman, which he *rents* for his use; (f) and a room used by a *lodger* for residence and

Burglary and other criminal offences, with respect to a *dwelling-house*.

(t) 2 T. R. 498.

(u) 5 Bar. & Ald. 407; see 2 Simon, 150; and see further, 1 Thomas's Co. Lit. 215, note 35.

(x) 2 Bla. C. 18; Co. Lit. 4 to 6.

(y) *Ante*, 94, 95, and 161.

(z) 2 Bar. & Cres. 76.

(a) 2 Stark. R. 508.

(b) 7 & 8 Geo. 4, c. 29, s. 11 & 13.

(c) 8 Bar. & Cres. 461.

(d) 2 Leach, 931.

(e) 1 Hale, 556; Cro. Car. 474;

3 Burn's J. Larceny, 574.

(f) 1 Leach, 305.

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sleeping, if the landlord does not sleep under the same roof; (g) and a dwelling-house may be so divided as to form two or more dwelling-houses, in the meaning of the word, in the definition of burglary; (h) and if there be several inmates, and they respectively lock the doors of their respective rooms, although they all use one common outer-door, the apartments of such inmates are considered as their respective dwelling-houses, provided the common landlord does not himself reside and sleep in the house. (i) The describing the building in an indictment for burglary merely as a "house" would be defective; (k) and if the burglary were in a building adjoining the dwelling-house, and connected therewith as above, it must be either laid in the dwelling-house generally, (and which seems preferable) or "in a building, part of the dwelling-house, and communicating therewith *immediately*," or "communicating with such dwelling-house by means of a covered and inclosed passage, leading from the same building to the said dwelling-house." (l) So the house must be actually *used* as a *dwelling and for sleeping* at the time of the burglary; for a house under repair, or a building merely intended and constructed as a dwelling-house, in which no one lives, though the owner's property is deposited there, is not a place in which burglary can be committed, for it cannot be deemed his "*dwelling-house*" until he has taken possession and began to inhabit it; (m) nor will it make any difference if one of the workmen, engaged in the repairs, sleep there at night in order to protect it; (n) nor though the house is ready for the reception of the owner, and he has sent his property into it, preparatory to his own removal, will it become for this purpose his dwelling-house. (o) So if the landlord purchase the furniture of his outgoing tenant, and procure a servant to sleep there, in order to guard it, but without any intention of making it his own residence, a breaking into the house will not amount to burglary (p) And the mere casual use of a tenement will not suffice; (q) and where neither the owner nor any of his *family* have slept in a house, it is not his dwelling-house, so as to make the breaking it burglary, though he had used it for his meals and all the

(g) 1 Leach, 89, 237.

(h) Id. ib.; 1 Leach, 537; 2 East, P. C. 504; Salk. 532.

(i) 1 Leach, 237, 427.

(k) 1 Hale, 550.

(l) *Samble*, 1 Leach, 144; 2 East, P. C. 512, 513.

(m) 1 Leach, 185; 2 East, P. C. 498; 1 Leach, 196; 8 R. & C. 461.

(n) 1 Leach, 186.

(o) 2 East, P. C. 498; 2 Leach, 771.

(p) 2 Leach, 876; 2 East, P. C. 497, 498; 1 Leach, 196.

(q) 1 Hale, 557.

purposes of his business.(r) But it is not absolutely necessary to make it burglary that any person should be actually within the house at the time the offence is committed, for if the owner has regularly resided there and leave it *animo revertendi*, though no person reside there in his absence, it will still be his dwelling-house.(s) So if a person go a journey,(t) or have a town-house and country-house, and sleep alternately at each, leaving the other shut up, they both are his dwelling-house as respects the offence of burglary;(u) and though if a person leave his dwelling-house without intent to return, and leave persons in it merely as a warehouse or workshop, it ceases to be his dwelling-house, it would be otherwise if his family continue to reside in a part.(v) In general the occupation of a servant, as part of his master's family, and in that character, and not as a tenant, will be considered the occupation of a dwelling-house by his master.(x)

7. "*Other Buildings and Erections.*" It frequently becomes necessary to ascertain the exact and precise nature, description, and particular name of *other buildings* besides dwelling-houses, not only as referred to in deeds and wills, but also in acts of parliament, especially in those relating to the criminal law, where very frequently the degree of crime and extent of punishment greatly depend on the exact place where the offence was committed, and its particular name and character. Questions sometimes arise upon *civil* statutes, thus a "*counting-house*" is not a house, warehouse, shop, shed, stall or stand, within the meaning of the act, giving extended jurisdiction to the London Court of Requests.(y) But it is principally with reference to the *criminal* law that the precise nature of the building becomes material, as will appear from examination of the recent criminal acts.(z)

7. "Other buildings and erections."

The *Larceny Act*, 7 & 8 Geo. 4, c. 29, as regards the *places* of taking, enumerates "church or chapel," "dwelling-houses," and "other buildings *within* the curtilage," "shop," "warehouse," or "counting-house," "building," "field," or "other place *used* in progress of manufacture." "Vessel, barge or boat in a port of entry or discharge, navigable river or canal,

(r) *Rex v. Martin*, Russ. & R. C. C. 108.

(s) Hawk. c. 38, s. 11.

(t) 2 East, P. C. 496.

(u) Fost. 77; 2 East, P. C. 496.

(v) Russ. & R. C. C. 187, 442c.

(x) Russ. & R. C. C. 115, 185.

(y) 5 Dowl. & Ry. 628.

(z) *Larceny Act*, 7 & 8 Geo. 4, c. 29, s. 10 to 14, 44, 45; *Malicious Injury Act*, 7 & 8 Geo. 4, c. 30, s. 2; and *Hundred Act*, id. c. 31.

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creek communicating therewith, or dock, wharf or quay adjacent thereto;" and the stealing or ripping, cutting or breaking, with intent to steal any glass or wood-work belonging to "any *building whatsoever*," or any lead, iron, copper, brass, or other metal, or any utensil or fixture, whether made of metal or other material, respectively fixed in or to "any *building whatever*;" or any thing made of metal, "*fixed in any land*," being private property, or for a *fence* to any dwelling-house, garden or area, or in any square, street, or other place dedicated to public use or ornament, is felony. This enactment extends the previous provisions to all utensils and fixtures of whatever material made, and a church and *all* buildings are within the act, and therefore we have seen that in an indictment for stealing lead, it is sufficient to state that it was fixed to a certain building, without further description. (a)

The *Malicious Injury Act*, 7 & 8 Geo. 4, c. 30, s. 2, renders capital the maliciously setting fire to any "*church or chapel, house, stable, coachhouse, outhouse, warehouse, office, shop, mill, malthouse, hop oast, barn or granary, or any building or erection used in carrying on any trade or manufacture, or any branch thereof*;" and section 7, which makes felony the maliciously pulling down, or destroying, or damaging with intent to destroy or render useless, enumerates any steam-engine, or other engine, for sinking, draining or working any "*mine, or any staith, (b) building or erection used in conducting the business of any mine, or any bridge, waggon way or trunk, for conveying minerals from any mine*;" and section 8, for the punishment of persons guilty of riotously and feloniously pulling down or destroying, or beginning so to do, enumerates the same last-mentioned buildings, and extends also to machinery there; and the 14th section relates to the destruction of "*toll houses, buildings, and weighing engines*."

The 7 & 8 Geo. 4, c. 31, (which gives an *action against the hundred* for felonious injuries,) enumerates the same buildings as those above in 2d and 7th sections of chap. 30. It seems, therefore, that these criminal acts do not protect *all* buildings and erections whatever; but only particular specified buildings, and including all buildings which have been used in trade or manufacture, with the exception of the offence of stealing glass or wood fixed to any building, or metal to a fence or in land.

(a) 1 East's P. C. 592; Russ. & Ry. C. C. 69.

in consequence of the decision in Holt's C. N. P. 466.

(b) *Scoble*, that word was introduced

It should seem that as well at common law as under these statutes, nothing can be deemed a "*building or erection*" unless it be let into and part of the realty, and not moveable,^(c) and consequently mere hustings could not be within the act;^(d) and it was held, that a building merely *intended* to be a house or other named erection, but not as yet completed not inhabited, but in which straw had been placed, was not either a house or a warehouse within the above act, subjecting the hundred to make compensation for the riotous destruction of a house or warehouse;^(e) and no building only in part erected, and not previously used for one of the purposes alluded to in the acts, would be within the protection of either of the criminal acts specifying *particular* buildings.^(f) And as "*gaol*" is not named in the 7 & 8 Geo. 4, c. 30, the tumultuously pulling down the same, as a *gaol*, would not be punishable under that act,^(g) though a common gaol was holden a house within the meaning of the 9 Geo. 1, c. 22.^(h) With respect to the 7 & 8 Geo. 4, c. 29, and c. 30, it will be observed, "that the goods whilst laid, placed or exposed, during any stage of manufacture, in any building, field or other place, are more fully protected than by the prior repealed act, 18 Geo. 2, c. 27, under which it was necessary to prove that the building had been *generally* used for the purpose of the manufacture,⁽ⁱ⁾ but this evidence would not, it should seem, now be necessary.

8. The term *outhouse* is not used in the Larceny Act;^(k) 8. *Outhouses*. but it is used in the Malicious Injury Act,^(l) and in the Vagrant Act, as well as every *deserted or unoccupied building*;^(m) and if any person wandering abroad and lodging in any barn or *outhouse*, or in any deserted or unoccupied building, or under a tent, not having any visible means of subsistence, nor giving a good account of himself, and every person found in any *outhouse* for any unlawful purpose, is to be deemed and punished as a rogue and vagabond.⁽ⁿ⁾ It has been held under an enactment similar to the Malicious Injury Act, that a *school-room*, which was separated from the dwelling-house by a narrow passage about a yard wide, the roof of which was partly upheld by that of the dwelling-house, the two buildings, together with

(c) *Ante*; 148, 149; 1 Taunt. 19.
(d) 2 Dowl. & R. 96.
(e) 8 Bar. & C. 461.
(f) 8 Bar. & C. 461; and see 1 Leach, 81, 184; Russ. & Ry. C. C. 295.
(g) Bristol Gaol, Western Circuit, 30 Jan. 1832.

(h) 2 Bla. R. 682; 2 East's P. C. 1020.
(i) Russ. & Ry. C. C. 53; 4 Bla. C. 240, in notes.
(k) 7 & 8 Geo. 4, c. 29.
(l) *Id.* c. 30.
(m) 5 Geo. 4, c. 83, 84.
(n) *Id.* *ibid.*

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some other, and the court which inclosed them, being rented by the same person, was properly described as an *outhouse*; (o) and it has been suggested that a dairy-house or a mill-house would be deemed an *outhouse* within that act, or at least part of the mansion-house. (p) But where a person was indicted for setting fire to an outhouse, commonly called a paper-mill, and it appeared that the building was a loft annexed to the mill, it was held that the offence was not within the act; and it was doubted whether a mill could be deemed an outhouse within the meaning of the act. (q) But it seems that a building, although annexed to a dwelling-house, may be deemed an outhouse for some purposes, though for others it might be part of the dwelling-house. (r)

9. Mills.

9. *Mills.*(s) Ejectment lies for "flour-corn mills," without saying of what kind, whether wind-mills or water-mills, because the precedents in the Register are in that form; (t) but if on the trial the mill should turn out not to be annexed in any respect to the freehold, but a mere moveable chattel, then, although previously demised for a term, the action of ejectment would *pro tanto* fail; (u) and we have seen that unless a mill be *annexed* to the soil, or to some other thing so annexed, it is not part of the realty, and is neither rateable to the poor, nor could the party renting it acquire a settlement. (x) The *maliciously* and feloniously setting fire to any mill, or tumultuously and feloniously destroying a mill, is a capital felony under the Malicious Injury Act, (y) and under that general term no doubt a cotton-mill would be included. (z)

10. Improve-
ments.

10. *Improvements* (a term used in leases) is sometimes of doubtful meaning; it would seem to apply principally to buildings, though generally it extends to the amelioration of every description of property, whether real or personal; but when contained in any document, its meaning is generally explained by other words. Where the covenant by a tenant was to leave all erections and buildings which should be erected during the term, the covenant was held to include only such as had been let into the

(o) Russ. & R. C. C. 295.

(p) 3 Inst. 67; Burn's J. Burning, II.

(q) 1 Leach, 49; 2 East's P. C. 1020.

(r) 2 East's P. C. 1021.

(s) *Ante*, 152, and 1 B. & Adolp. 161;

1 Bro. & B. 501; 4 J. B. Moore, 281, as to when a mill is a fixture or tenement,

and when not.

(t) 1 Mod. 90.

(u) 1 B. & Adolp. 161, *supra*, note (s).

(x) *Id.*; 1 Brod. & B. 506; 4 J. B.

Moore, 281, *ante*. 152.

(y) 7 & 8 Geo. 4, c. 30, s. 2 and 8.

(z) 2 Russ. Crim. & Mis. 493.

ground or otherwise fixed to the freehold. (a) But where the covenant was to leave at the end of a *term* a water-mill with all fixtures, fastenings, and *improvements*, during the demise fixed, fastened, or set up on or upon the premises, in good plight and condition, reasonable use and wear only excepted, it was held to include a pair of new mill-stones set up by the lessee during the term, although the custom of the country in general authorized the tenant to remove them. (b) And where a tenant covenanted to repair, &c. an injunction was obtained against his removal of *engines*, although the original building had been increased laterally and upwards; and with larger substituted engines. (c)

• 11. *Curtilage*, (*curtilagium*, from the French *cour*, court, 11. Curtilage. and Saxon *leagh*, *locus*,) has been defined to be a court-yard, backside, or piece of ground lying near and belonging to a dwelling-house; (d) and though it is said to be a yard or a garden belonging to a house, as if the terms were synonymous, yet it seems clear that they are distinct things. (e) In its most comprehensive and proper legal signification, it includes all that space of ground and buildings thereon which is usually inclosed within the *general fence* immediately surrounding a principal messuage and outbuildings and yard closely adjoining to a dwelling-house; but it may be large enough for cattle to be levant and couchant therein; and therefore, although a person cannot prescribe for a right of common appurtenant in respect of a house alone, yet he might so prescribe as owner of a house and *curtilage*; (f) and a feoffment of a “house with the appurtenances,” we have seen, will pass the curtilage. (g) And it should seem that the curtilage would equally pass by the word “messuage,” or “house,” without the words “with the appurtenances,” for at least in a deed nothing can legally pass that itself lies in livery, and cannot in law be *appurtenant*. (h) Before as well as since the last act against burglary and larceny, (i) the strict meaning of the term *curtilage* was most im-

(a) 1 Taunt. 19.

(b) 9 Bing. 24; 3 Sim. 450; see 2 Ves. & B. 349.

(c) 3 Sim. 450; and see *ante*, 94.

(d) 4 Ed. c. 1; 35 Hen. 8, c. 4; 39 Eliz. c. 10; 6 Co. Rep. 64; *Mihi dici videtur curtilagium a currillium et ago* (sil.) *locus ubi curtis vel curtilli negotium agitur. Spelm.*

(e) Jac. L. Dic. tit. *Curtilage*. And again: “Garden and curtilage, i. e. a little

garden, yard, field, or piece of void ground lying near and belonging to the messuage and houses adjoining to the dwelling-house.” Shep. T. 94

(f) 5 T. R. 46; 2 Ld. Raym. 1015; 1 Salk. 169; Co. Ent. 49, b.; but see 5 Taunt. 244.

(g) 2 Saund. 401, note 2; 1 Bar. & Cres. 350; Shep. T. 94, *ante*, 158.

(h) *Ante*, 153 to 158.

(i) 7 & 8 Geo. 4, c. 29.

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portant as respected the *capital* offence of *burglary*, which might be committed as well in a detached outhouse within the curtilage, as in the principal dwelling-house itself; (*k*) but now by that act (7 & 8 Geo. 4, c. 29, s. 11, 13,) it is enacted that no building, although within the same curtilage with the dwelling-house, and occupied therewith, shall be deemed to be part of such dwelling-house, for the purpose of burglary, or for any of the criminal purposes mentioned in the act, unless there shall be a communication between such building and dwelling-house, either immediate or by means of a covered and enclosed passage leading from the one to the other; (*l*) and the 14th section enacts that the feloniously breaking and entering any other building not so connected with the dwelling-house, but being within its curtilage, and occupied therewith, shall be punished with transportation for life, or seven years, or not exceeding four years' imprisonment, with whipping, if a male: so that the term *curtilage* and its strict extent is still very important as regards the degree of punishment, though the capital punishment for burglary can only be inflicted when the building falls strictly within the description in the 11th and 13th sections.

12. Area.

12. *Areas*. As respects the *criminal* law, a person found in or upon an *area* or *inclosed yard*, for any unlawful purpose, may be apprehended by any person, and punished as a rogue and vagabond. (*m*) The fence of an area also is protected, and stealing, or breaking it, with intent to steal it, is felony. (*n*) But the breaking the gate of an area is not burglary at common law, though thereby the offender afterwards enter the house, the outer door there of being open. (*o*)

13. Yards, and courts, and back-sides.

13. *Yard* is a common term in *deeds*, and this, together with *courts*, are mentioned in the Highway Act as places which cannot be taken for the purpose of widening a highway. (*p*) It is illegal to keep a ferocious dog in a *yard*, with the gate open, without giving full notice of the danger, and if that be omitted, the owner may be liable to make compensation for damages. (*q*) So persons found in an *inclosed yard* for any unlawful purpose may be apprehended and punished as a rogue and vagabond. (*r*)

(*k*) 4 Bla. C. 225.

(*l*) And see *Rex v. Jenkyns*, Russ. & R. C. C. 244. This enactment materially alters the law in 1 Leach, 357, and in *Rex v. Lühgo*, R. & R. C. C. 357, and properly confines the capital offences of burglary to cases where the resident of a dwelling-house itself may be put in terror, or be

endangered by breaking the outer door or other security.

(*m*) 5 Geo. 4, c. 83, s. 4.

(*n*) 7 & 8 Geo. 4, c. 29, s. 44.

(*o*) *Rex v. Davis*, R. & R. C. C. 322.

(*p*) 13 Geo. 3, c. 78, s. 16.

(*q*) 4 Car. & P. 297, *post*.

(*r*) See Vagrant Act, 5 Geo. 4, c. 83.

Backside was a term formerly used in conveyances and even in pleadings, and is still adhered to with reference to ancient descriptions in deeds, in continuing the transfers of the same properties; it imports a yard at the back part of or behind a house, and belonging thereto; but though formerly used in pleading, (s) it is now unusual to adopt it, and the word yard or preferred.

14. *Gardens and orchards and nursery grounds, hothouses, greenhouses, and conservatories.* (t) An ejectment lies for a garden, or for an orchard, without other name. These are particularly named and protected in the modern acts against larceny and malicious injuries. The power to enter gardens or orchards is also excepted in the highway and other acts, and therefore it is not an unusual expedient to plant fruit trees in a field to prevent the turning a road over the same, (u) and garden grounds used for trade are as much protected by that exception as private pleasure gardens, and an injunction against entering them, for the purpose of a highway, may be equally obtained in the one case as in the other. (x) And where a close had been planted with shrubs within the last six years, and recently with potatoes, it was held to be a garden within the meaning of an exception in an action for entering and searching for minerals in the lands of another, according to a custom, the sites of houses, gardens, orchards, and highways, excepted. (y)

14. Gardens, and orchards, &c., and things therein.

Annual roots and flowers, planted in a garden, may be removed by any tenant; and so may young fruit trees and shrubs in the garden or nursery of a person to whom the same has been let for the purpose of sale or trade. (z) But unless a garden or orchard or other land has been so let as nursery ground, no tenant can, as between him and the landlord, remove any flower, root, tree, or shrub, not strictly an annual, or not usually taken up at one season of the year, and re-planted at another season; and if, without authority, he should remove the same, he would be liable to an action for the waste. And if a tenant of any description has made strawberry-beds, he cannot, either before or at the expiration of his tenancy, and whilst they are likely to continue productive, remove or destroy the same, without being liable to an action for the injury to the landlord or succeeding tenant. (a)

(s) See 2 Ld. Raym. 1399.

(t) 7 & 8 Geo. 4, c. 29, §. 42; and id. c. 30, s. 21.

(u) 13 Geo. 3, c. 78, s. 16.

(x) Belt's Suppl. to Vesey, sen. 105.

(y) 4 Dowl. & R. 222.

(z) 2 East's R. 88.

(a) 1 Campb. Rep. 227.

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As respects *criminal* injuries, the 7 & 8 Geo. 4, c. 29, s. 42, enacts, that if any person shall *steal*, or destroy, or damage, with intent to steal, any plant, root, fruit, or vegetable production, growing in any garden, orchard, nursery-ground, hot-house, greenhouse, or conservatory, he may, on summary conviction, be imprisoned for six calendar months, and the punishment is increased on subsequent offences. And by 7 & 8 Geo. 4, c. 30, s. 19, *malicious injuries*, to the extent of 1*l.*, to any tree, sapling, or shrub, growing in any park, pleasure ground, garden, orchard, or avenue, or in any ground belonging to any dwelling-house, is felony, punishable with transportation for seven years, or two years' imprisonment; and by the 21st section, the *maliciously* destroying, or damaging with intent to destroy, any plant, root, fruit, or vegetable production, growing in any garden, orchard, nursery-ground, hothouse, greenhouse, or conservatory, is punishable with imprisonment for six calendar months, with hard labour, or forfeiture of the value of the injury, and 20*l.*

15. Ground adjoining or belonging to a dwelling-house, &c.

15. There is another new and rather too loose and undefined a description of ground or land introduced in modern acts, which make it more penal to commit offences there than elsewhere, viz. *ground adjoining or belonging to* any dwelling-house, park, pleasure ground, garden, orchard, avenue, or "any ground adjoining or belonging to any dwelling-house." This is the description of certain places particularly protected as respects *any tree, sapling, shrub, or underwood* there growing, the stealing or damaging which, with intent to *steal* the same, (b) or the *maliciously injuring* the same, (c) is punishable as a *felony*, and simple larceny, in case the value of the article or articles stolen, or the amount of the injury shall exceed 1*l.*; (d) whereas, the stealing such articles *elsewhere* would not be punishable as a felony, unless the trees were worth, or the damage done exceed, 5*l.*, and if under that amount, the offence is only punishable summarily with payment of the damage, and not exceeding 5*l.* penalty. (e) The words "*adjoining to any dwelling house*" in these acts, import actual contact, and therefore ground separated from a house by a narrow walk and paling, with a gate in it, is not within their meaning; (f) and whether ground be pro-

(b) 7 & 8 Geo. 4, c. 29, s. 38.

(c) Id. c. 30, s. 19.

(d) Id. c. 29, s. 38.

(e) Id. s. 39.

(f) 1 Mood. & M. 341, on sect. 38.

perly described as a "garden" within the same section, is a question for a jury, and it has been held that the word "plant" and "vegetable production" in section 42, do not apply to young fruit trees intended for sale, and the place where the latter are growing ought to be described as a nursery, and not as a garden.

So the wilfully taking or destroying any fish in any water that shall run through or be in any land adjoining or belonging to the dwelling-house of any person being the owner of such water, or having a right of fishery therein, is a misdemeanor; whereas the taking fish in other water is only an offence punishable summarily with a pecuniary penalty of 5*l.* (*g*). It is to be regretted that in declaring such acts to be felonies or misdemeanors, a more defined description of place or distance from the dwelling-house than land or ground adjoining or belonging to a dwelling-house, has not been adopted. (*h*) It was held, that a stream of water (in which the plaintiff had the several fishery) running by the side of a piece of ground which it inclosed on every side, except that on which it was bounded by the water, was not a stream in inclosed ground, within 5 Geo. 3, c. 14, s. 3, so as to subject a person fishing therein to the penalty inflicted by that act. (*i*)

16. *Land* is the most comprehensive term in law in describing real property *corporeal*, and by it every thing terrestrial and fixed will pass. (*k*) By that term, without other words, in a conveyance, not only land itself of every description, whether yards, orchard, garden, arable, meadow, pasture, woodland, land covered with water, and waste land, will pass, but also all houses and buildings thereon, and every thing thereon growing or thereto annexed; and therefore though in conveyances and wills, and declarations in ejectment, it has been usual to describe the particular kind of land, as so many acres of arable land,—acres of meadow land,—acres of pasture land, &c. &c. (and it is said that otherwise it will be taken to

(*g*) 7 & 8 Geo. 4, c. 29, s. 34.

(*h*) *Quare*.

(*i*) 1 Marsh. 127; 5 Taunt. 440.

(*k*) Co. Lit. 4, 5, 6; 2 Bla. C. 17, 18; 1 Burr. 133, 144. It was formerly considered necessary in ejectment to describe the property more particularly than at

present, so that the sheriff, by reading the writ of *habere facias possessionem*, might know what to give the lessor of the plaintiff possession of; but now, as the plaintiff is to take possession at his peril, such particularity is no longer required.

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mean *arable* land, (*l*) and also to enumerate houses and all kinds of outbuildings, that is not strictly necessary; (*m*) and if a person eject another from land and afterwards build thereon, it suffices for the owner to bring his ejectment for the land without specifying the building. (*n*) But an advowson in *gross* being an incorporeal hereditament, though belonging to the same owner, will not pass under a devise of *lands*, though it would if the words "tenements and hereditaments" be added. (*o*)

Cujus est solum ejus est usque ad cælum is a well known maxim in law, so that by the conveyance or devise of "*land*," every thing, as well above as below, such as mines, unless expressly excepted, will pass; (*p*) and if a person erect or fix any thing hanging *over* the land of another, and not merely temporarily passing over it; or if he from an adjoining highway fire off a gun, so that the shot pass over the land of another; (*p*) or if he undermine his land, or penetrate his mine, (*q*) these are direct and immediate injuries to the land, for which trespass is sustainable.

17. ----- Acres,
more or less. (*r*)

17. — Acres *more or less*. When the quantity of land to be sold or demised is stated, it is usual to describe the quantity as "containing by estimation — acres *more or less*," and which imports that the precise quantity is not warranted; but a large deficiency, such as 100 acres *short*, in land described as "349 acres more or less," would not be tolerated. (*s*) In cases of this description, where there has been an actual conveyance, relief would not be so readily obtained in equity, because the party had been guilty of laches in proceeding so far. (*t*) But it seems, notwithstanding the opinion of the then Master of the Rolls to the contrary, (*u*) that when the deficiency is considerable, the purchaser will be entitled to a compensation or deduction

(*l*) It has been considered that *land* in a fine or recovery, unless otherwise described, as meadow, pasture, wood, &c. means *arable* land; Salk. 256; Cowp. 316. The word *terra*, land, was anciently spelt *tera*, so called a *terendo*, quia *vagere teritur*, and in that sense it included only what was *ploughed*, but legally it has the more enlarged meaning, see Co. Lit. 4 a. When the pleadings were in Latin, the *terra*, without other words, would therefore import *ploughed* land, and this accounts for the decision, that *terra* alone denoted only *ploughed* land, and see 1 Thomas's Co. Lit. 333.

(*m*) As to utility of general words, see 1 Prest. Ab. 93.

(*n*) 1 Burr. 133, 144; but it is there

said, that if the building be a *messuage*, it ought then to be stated, *sed quare* the distinction.

(*o*) Id. *ibid.*; 4 Bing. 293, *ante*.

(*p*) 2 B. & Adolp. 443; Shep. T. 90; 2 Bla. C. 18; and as to the remedies for firing off a gun over land, &c. 11 Mod. 74, 130, 184; 2 Burr. 1114; 1 Stark. R. 56; see *post*, 184, Mines.

(*q*) 1 Bla. R. 482; 3 Burr. 1556.

(*r*) See in general, Sug. V. & P. 8th ed. 294 to 303; 1 Thomas's Co. Lit. 217, 219; 6 Geo. 4, c. 12, s. 23; 10 Bar. & C. 446; and see *Cross v. Elgin*, 2 B. & Adolp. 106.

(*s*) 2 Russ. R. 570; 2 B. & Adolp. 106.

(*t*) See 2 Freem. 106.

(*u*) 1 Ves. & B. 375.

in respect of the deficiency, but not if the quantity be only a little less than that described.(x) In general the term *acres* means according to *statute* measure, and which is now prescribed by 5 Geo. 4, c. 74, s. 1 & 2, and a contract to sell by other measure would be illegal.(y) There are, however, two descriptions of admeasurement; the one, the landlord's or selling measure, including the hedges, fences and ditches, and growing bushes and underwood in the divisions between closes; and the other the tenant's, or "*agricultural measure*," including only the ploughing or mowing acres, a distinction sometimes essential to be remembered. In case of the sale of *copyhold*, as 219 acres more or less, it suffices for the vendor to show that the tenants have long been in the actual possession of land about that quantity, although from the description on the Court Rolls that quantity is not distinctly made out, it being notorious that it is most difficult to make ancient descriptions accord with the modern.(z)

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As respects *criminal* injuries to mere land, they are *forcible* entries and *forcible detainers*,(a) or wilful and malicious petty injuries, punishable summarily before one justice, under the 7 & 8 Geo. 4, c. 30, s. 24; but the latter act only extends to cases of *actual injury*, and not merely to persons trespassing by walking over grass, and not occasioning any actual damage; (b) and by express proviso the enactment is not to extend to trespasses under a fair and reasonable supposition that a party had a right to do the act, or to a trespass not wilful and malicious, in hunting, fishing, or in pursuit of game.(c) But the recent Game Act subjects trespassers in pursuit of game, and who are not entitled to the same, to a summary conviction and penalty of 2*l.*(d) and authorizes the owner of the land to take away from the party trespassing, all the game in his possession, and inflicts a penalty for refusing to give it up.(d)

Criminal injuries to land.

18. *Prima Tonsura* is a grant of a right to have the *first* crop of grass; and *aftermath* is a right to the *last* crop or pasturage; so there may be a right to the *herbage* or to the *pasture* for one hundred sheep; and all these are considered exclusive and *corporeal* rights, and are recoverable in eject-

18. Herbage, *Prima Tonsura*, &c. *aftermath*, beast gates and cattle gates.

(x) See 17 Ves. 394; 6 Ves. 328; 1 Esp. Ca. 229; Sug. Vend. 372, 373, 5th ed., and 8th ed. p. 294 to 303, where see the cases collected.

(y) Cro. Eliz. 267; 4 T. R. 314; 10 Bar. & C. 446; and see Sugd. V. & P. 302, 303; 1 Thomas's Co. Lit. 217; 219;

and see 6 Geo. 4, c. 12, s. 23.

(z) 4 Russ. R. 267.

(a) *Post*.

(b) 2 Car. & P. 585; 1 Mood. & Mal. 56; 1 D. & R. 223.

(c) 7 & 8 Geo. 4, c. 30.

(d) 1 & 2 W. 4, c. 32.

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ment, or damages to them in trespass; (e) but the ejectment should be brought specifically for the *first* grass, or for the *aftermath*, and not for the land generally; (f) one person may hold the *prima tonsura* of land as copyhold, and another may have the soil and every other beneficial enjoyment of it as freehold. (g) So in Suffolk, ejectment lies for a *beast gate*, and in Yorkshire for *cattle gates*, (h) for both these are considered corporeal interests, and quite distinguishable from mere rights of common of pasture, the owners of them being tenants in common, and having a joint possession, but several inheritances, and are as much demisable as any other tenements, and cattle gates are conveyed by lease and release, and if devised, the will must be duly attested by three witnesses, according to the statute against frauds, (i) and the owner of them may acquire a settlement by the occupation of them. (j) All these are considered to be corporeal interests in the land, and subject the owner of them to the poor rate in respect thereof. (k)

Fold courses, sheepwalks, wayleaves, and exclusive rights of pastures or commons. (l)

"*Fold courses, sheepwalks, wayleaves, and other exclusive rights of pasture*," are rights nearly of the same description as the last. These sometimes exist quite distinct from mere rights of common or rights of way, and so much so as to constitute *corporeal* real property, being exclusive rights, and for an injury to which trespass is sustainable, and which property is rateable to the poor; whereas a mere right of common or of way, being *incorporeal* property, cannot be the subject of an action of trespass, nor is the same rateable. (m) A *waggon way*, when with exclusive occupation of the ground, is of this description, and entitles the owner to an action of trespass, and he is liable to be rated to the poor. (n)

But a mere *right of common of pasture*, or a mere right of way, is only *incorporeal*, and is not subject to the poor rates, and the owner's remedy for an injury is only by action on the case; (o) and so is right to *panage*, which is only of the mast which falls from the trees, and not part of the soil itself. (p)

19. Woods and underwoods.

19. *Woods and underwoods*. The precise nature of these is frequently essential to be known. Under the statute 43 Eliz.

(e) 13 East, 155; Cro. Car. 362; Hardw. 330; 2 Dal. 95.

(f) 2 T. R. 451; Hardw. 330.

(g) 7 East, 200; 3 Smith, 261, S. C.

(h) 2 Stra. 1063, 1084; 2 T. R. 452; R. T. Hard. 167.

(i) 1 T. R. 137.

(k) Burn's J., Poor Law.

(l) See as to a fold course, sheepwalk, &c. 1 Thomas's Co. Lit. 218, and note.

(m) 9 Bar. & Cres. 827; 5 East, 480; 4 Bar. & Cres. 750.

(n) 7 T. R. 598; Burn's J. Poor, 88.

(o) Post; 9 B. & Cres. 827; 2 T. R. 90.

(p) 1 Lev. 212; 1 Sid. 116.

c. 2, only "*saleable underwoods*" are rateable to the poor; (q) and under the tithe law numerous questions arise. A sale of trees or underwood, to be cut down, would now be held to be a sale of goods and chattels, and not of an interest in land. (r) By the grant of all woods, will pass all the highwood and underwood, and not only the wood growing upon the land or soil, but the land or soil itself whereon it grows; but if a man grant to another all his saleable underwoods within his manor, which have been usually sold, with free entry, egress and regress for selling, making, and carrying away the same, then the soil does not pass, but the wood only: (s) though it is said, that without the words, "with free entry, &c." the soil would have passed. (t) Woods and underwoods will pass in a fine or recovery, by the description of so many acres of wood, and so many acres of underwood, &c. And an exception of all timber trees and wood (not in the plural) does not except the soil on which the trees and wood grow. (u)

20. *Trees and underwoods* we have seen, although growing, are, after they have been agreed to be sold, and sold, considered as *quasi* personal property; (x) but generally speaking, when growing, they are part of the realty, though necessarily less durable than the land itself. If trees be excepted in a lease, the land on which they grow, or at least that immediately adjoining the stem and roots, is impliedly also excepted, and consequently, if the tenant cut down the trees, the landlord may maintain trespass for breaking his *close*, as well as for cutting down his trees. (y) But where by a lease of a tenement described as containing nineteen acres, save and except all timber trees, wood, (*not* woods in the *plural*), underwood, &c., it was held that six acres of the *soil*, which at the time of the lease were covered with growing wood were not excepted, but passed to the lessee. (u) When trees are *excepted*, it frequently becomes a question, what trees were intended; (z) an exception of trees in a lease does not include *apple* trees. (a)

Trees become the frequent source of dispute between *neighbours*, upon questions to whom they or their produce belong, and when they may be cut if overhanging the land of another,

(q) 10 East, 219; 1 B. & Cres. 375; Burn's J. tit. Poor, 80 to 83; 1 B. & Cres. 375; 10 East, 219.

(r) 9 B. & C. 56; ante, 93.

(s) Shep. T. 94.

(t) Id. 95, *sed quare*.

(u) 1 Bar. & Adol. 622.

(v) Ante, 86, 93; Off. Exec. 49, 60;

Toller, 6 ed. 194, 195.

(y) *Rolls v. Roch*, 2 Selwyn's N. P. 1237; but see 1 Bar. & Adol. 625; and see further as to trees, Saund. Rep. Index, tit. Trees.

(z) 16 East, 316.

(a) 4 Taunt. 316; and see 5 Bar. & Cres. 842; 8 D. & R. 657; and see Id. 651.

which points will be considered in the seventh chapter, relating to the abatement of nuisances. (b)

As regards *criminal injuries* in the nature of *larceny* or *malicious injuries* to trees and every description of *growing wood*, they are provided for by the two consolidating statutes against offences of that nature. (c) The offences in the nature of larceny are *stealing trees and vegetable productions* from gardens, orchards, &c. if of 1*l.* value; or elsewhere, if of 5*l.* value, punishable by indictment as simple larceny. And stealing trees, &c. growing any where, if of one shilling value, is punishable summarily before justices, with 5*l.* penalty; and a second offence with imprisonment for a year, and whipping; and a third offence as simple larceny; but if the tree be not of one shilling value, the stealing it is not at all punishable criminally. (d)

As regards *malicious injuries*, if the trees or shrubs destroyed were in a *garden or orchard*, &c., and of the value of 1*l.*, the offence is a felony, punishable with transportation for seven years, or two years' imprisonment; (e) and if the trees or shrubs were elsewhere, and of the value of 5*l.*, the injury is punishable in like manner; but if the trees, wherever growing, were of the value of one shilling, then the malicious injury is punishable as in the case of larceny of trees of such small value.

22. Mines. (f) 22. *Mines* are recognized at common law and under various statutes. These, unless expressly excepted, would be included in the conveyance of *land*, without being expressly named; and, therefore, though where mines have been previously used or opened, it is usual to describe them in a deed as a mine, yet, (excepting in a lease *merely* of the MINE, and not of the surface) no such description seems essential; (g) and so *vice versâ* by the grant of a mine the land itself, the surface above the mine, if *livery* be made, will pass. (h) All mines (except of gold and silver, which belong to the crown by royal prerogative) (i) are the property of the owner in fee of the surface; (k) and if, therefore, a tenant for life open a new mine, he will be guilty of waste; but he may dig and take the profits of mines that are

(b) *Post*; and see 1 Mood. & M. 112.

(c) 7 & 8 Geo. 4, c. 29, s. 38, 39, and c. 30, s. 19, 20.

(d) 7 & 8 Geo. 4, c. 29, s. 38, 39.

(e) 7 & 8 Geo. 4, c. 30, s. 19; see observations on this act, *Millis v. Collett*, 6 Bing. 35; perhaps, if trees be excepted in a lease, even the tenant might be guilty of an offence against the act. See observations of Tindal, C. J., and Gaselce, J., *id.*

(f) See as to mines in general, 1 *Thomson's Co. Lit.* 218; 3 *Id.* 237; *Lears v. Branthwaite*; 2 B. & Adolp. 437.

(g) Co. Lit. 4; 2 Bla. C. 18; 7 East, 368; 2 Bar. & Ald. 570; 2 B. & Adolp. 437.

(h) Co. Lit. 6; Shep. T. 26; 1 Thomas's Co. Lit. 213.

(i) *Plowd.* 336.

(k) Co. Lit. 4, a.

open. (*l*) And he may open new pits or shafts for working the old vein, for otherwise the working of the same mine might be impracticable. (*m*) It is said that a recovery cannot be suffered of a mine alone, without the surface, because it is not in demesne, but in profit only. (*n*) Mines are not titheable of common right, though by custom they may be, because they are a part of the substance of the earth, and an annual produce. (*o*)

Ejectment lies for a *coal mine*, or for any other mine; (*p*) and in pleading it may be stated, "that the defendant entered a certain coal mine, or vein of coal, and dug, &c." or it may be alleged that the defendant broke the plaintiff's close, and there dug, made, and sunk divers, to wit, — pits, — shafts, and — holes, and there raised, dug, and got divers, &c. Trespass, and not case, will lie for encroaching on a *lead mine*, though the plaintiff has no property in the soil above the mine, but an exclusive right of digging. (*q*) But if it should turn out that the grant or lease of mines was so worded, as not to operate as an actual demise, but only as a *license to dig*, then the grantee or lessee could not, before he had actually opened the mines, nor could he after he had abandoned the same, recover in ejectment or trespass, though it is said that he might whilst he was in actual possession of working mines already opened. (*r*) There are in Derbyshire, Cornwall, and Mendip in Somersetshire, peculiar customs, authorizing any person to enter the land of another to search for and take away minerals, (the sites of houses, &c. gardens, orchards, and highways, excepted; (*s*) and a close planted with shrubs was holden a garden, within the exception.) (*t*) Where the ownership of a mine is distinct from that of the surface the exercise of the former is usually regulated by express deed, or by act of parliament, or by usage; so as to prevent the working the former becoming injurious to the latter. (*u*) If there be no such provision, then the mine must be so worked as not to injure the surface or the adjoining property, and if it be, trespass or case lies for any consequent injury, according to the place and mode of committing it. (*u*) As the statute 43 Eliz. c. 2, only mentions a particular description of mines, viz. "*coal mines*," no other mine, however annually productive, is rate-

(*l*) 5 Coke's R. 12.

(*m*) 2 P. W. 388; 3 Thomas's Co. Lit. 237.

(*n*) Shep. T. 41.

(*o*) 2 Inst. 651; see note (*u*), *infra*.

(*p*) Cro. Jac. 150; Noy, 121; 4 Mod. 113; Salk. 255; Adams's Eject. 3rd ed. 30.

(*q*) 1 Bla. R. 482; 3 Burr. 1556; 2 B. & Adolp. 437.

(*r*) 2 Bar. & Ald. 724, 652.

(*s*) 3 Burr. 1341; 1 Bla. R. 389; 10 East, 273.

(*t*) 4 Dowl. & R. 222.

(*u*) 7 East, 368; 2 B. & Ald. 570.

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able to the relief of the poor; (x) and even clay pits are, from the mode of working them, to be deemed mines; and, therefore, the profits derived from working them are not rateable towards the relief of the poor. (y) If a mine be of copyhold tenure, a lord of a manor is not, without special custom, entitled to enter or work the same. (z)

Criminal injuries to mines are peculiarly punishable. Those in the nature of *larceny*, are the stealing, or severing with intent to steal, the ore of any metal, or *lapis calaminaris*, manganese or mundick, or any wad, black cawke or black lead, or any coal or cannel-coal, from any mine, bed, or vein thereof, and which are declared to be felony, and punishable as simple larceny. (a) *Malicious injuries* are maliciously firing any coal, or cannel-coal mines, punishable capitally; (b) and the maliciously drowning or obstructing any mine is felony, punishable with transportation for seven years, or two years imprisonment; (c) and the destroying or damaging with that intent, or to render useless any steam engine or other engine for sinking, draining, or working any mine, &c. is punishable in like manner. (d) And if the last mentioned injury be committed feloniously by persons riotously and tumultuously assembled, their offence is punishable capitally; (e) and the hundred are liable to make compensation for such last mentioned injury. (f)

22. Hare and
rabbit war-
rens. (g)

22. *Hare and rabbit warrens, &c.* “*Warrens and grounds* lawfully used for the breeding or keeping of *hares or conies*, whether the same be inclosed or not,” are especially privileged and protected as respects *criminal injuries*; (h) but as regards civil rights and injuries, a hare or rabbit warren, unless it be a lawful *free-warren*, has no peculiar privilege, and such a nominal warren may be legally made on a party's own land without grant from the king, which a free warren could not; (i) the occupier, therefore, could not legally shoot a dog, self hunting there. (j) And (with the exception of a waste where there is common of pasture) a person may legally keep as many hares and rabbits on his own land as he pleases, however injurious to his own or his neighbour's, and who could sustain no action

(x) 3 Burr. 1341; 5 East, 478; Burn's J. Poor, 71, 72; where see the season assigned; and see id. note (a).

(y) 3 B. & Adolp. 424.

(z) 10 East, 189; 2 B. & Adolp. 437.

(a) 7 & 8 Geo. 4, c. 29, s. 37.

(b) Id. c. 30, s. 5.

(c) Id. s. 6.

(d) Id. s. 7.

(e) 1 d. s. 8.

(f) Id. c. 31, s. 2.

(g) Forests, purlieus, chases, parks, and free-warrens, though sometimes and in some respects corporeal rights, yet as they are generally considered franchises, will be considered under that head, *post*.

(h) 7 & 8 Geo. 4, c. 29, s. 30.

(i) 11 Rep. 87, b.; 1 Stra. 637; 2 Lord Raym. 1409.

(j) 11 East, 568.

for the damage; and his only remedy is to kill the rabbits when they escape on to his own land, and which he may legally do.^(k) But the owner of a waste, over which there is common of pasture, would be liable to an action for increasing the number of rabbits thereon, so as to leave insufficient common of pasture, because the commoners could not legally kill the rabbits, and, therefore, have no other remedy than by action.^(l) The lessee of land, in which there are numerous rabbits, may, unless restrained by express or implied covenant, legally plough up or destroy the burrows, which he could not do in case of a legal free-warren, without being guilty of waste.^(m)

The taking or killing a hare or coney in the *night*, in such a lawfully used ground, is an indictable misdemeanor;⁽ⁿ⁾ and the taking or killing the same in the *day time*, or at any time setting or using therein any snare or engine for the taking a hare or coney, is an offence punishable with a penalty of 5*l.*, recoverable before a justice, excepting taking of conies on any sea-bank or river-bank in Lincolnshire, as far as the tide extends, or within one furlong of such bank, where rabbits are injurious.⁽ⁿ⁾

23. *Preserves and private grounds.* The common law recognizes no particular privilege in favour of a preserve in any private ground, more particularly set apart for breeding game, excepting the ordinary law of trespass; and therefore, at common law, no action lies for frightening game from a preserve against a person who shoots near it, but upon his own land; game, in this respect, being no more considered than rooks;^(o) nor is an indictment sustainable at common law for a conspiracy to enter a preserve, and there to kill game, the act being considered a mere trespass to land.^(p) Preserves, however, as well as other grounds on which game resort, are protected by the enactment subjecting a person who maliciously casts poison *anywhere* with intent to destroy or injure the game, to the penalty not exceeding 5*l.*;^(q) and that provision would, no doubt, extend to prevent a person so placing poison even on his own land. The 7 & 8 Geo. 4, c. 29,^(r) protects hares

(k) 5 Coke's R. 105; Cro. Eliz. 547; Moore, 453; Cro. Car. 387; Sir W. Jones, 356, S. C.; 7 B. & Cres. 363.

(l) Id. *ibid.*; and *per* Bayley, J. 7 B. & Cres. 363.

(m) Moyle's case, Noy, 312 to 370; Co. Lit. 53 a, n. b. Hargrave; 3 Thomas's Co. Lit. 236; note 7.

(n) 7 & 8 Geo. 4, c. 29, s. 30; and

see the act against night poaching, 9 Geo. 4, c. 69, *post*; and 10 B. & Cres. 8, 9, which is not repeated by the Game Act, 1 & 2 W. 4, c. 32.

(o) *Carrington v. Taylor*, 2 Campb. 258; 11 East, 514.

(p) 12 East.

(q) 1 & 2 W. 4, c. 32; *post*, 189.

(r) Sect. 30; *ante*, 186, 187.

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and rabbits in warrens and grounds used for breeding the same; and the 9th Geo. 4, c. 69, renders certain night poaching peculiarly punishable. (*s*)

25. Game.

25. *Game*. The recent act 1 & 2 W. 4, c. 32, repealing all the prior acts, (except that against night-poaching, (*t*) and the certificate act, (*u*)) has, upon correct principles, placed game as property incident to the ownership of the soil or ground upon which the same is found, although it excludes a mere occupier, being a tenant for a short term, without having paid a fine upon granting the lease, from the right to kill the same, unless with the leave of the landlord, or by express reserved power in his lease; but with such leave or power the occupier, or indeed any person, having obtained a certificate, may now, without other qualification, sport and kill game upon the grounds of the landlord, whether in his own possession or in that of such tenant. The other provisions are highly conducive to the protection of game. The lord of a manor or lordship, not having a legal chase or free-warren, has no right in person or by his gamekeeper to sport over the lands of freeholders or copyholders within his manor, without the express permission of the party entitled to the game thereon. Under the repealed act 58 Geo. 3, c. 75, it was held that the sale of live pheasants was so illegal that no action could be supported for the price. (*v*)

26. Decoys.

26. A *Decoy*, established for twenty years, without such interruption as prevents its growing into a perfect right, is a place set apart for the resort and taking of wild fowl; and after such twenty years is so far a privileged place that a party may be sued for knowingly firing a gun, or making a noise even upon his own land or in a public navigable river, or open creek, so near it as to frighten away the fowl, although none of the fowl were killed, because it is maintained at considerable expense and trouble, and is a means of carrying on a trade. (*w*) The remedy is *case* where the injury has been committed *near* to the decoy, but *trespass* when it has been committed *in* the same. The acts against larceny and malicious injuries do not contain any particular provisions for the protection of *decoys* or wild fowl; (*x*) and though the Game Act requires a person to have

(*s*) See 10 Bar. & Cres. 89, *post*.

(*t*) 9 Geo. 4, c. 69, *post*

(*u*) 52 Geo. 3, c. 93, s. 5.

(*v*) 8 B. & Cres. 553.

(*w*) Holt, 14; 11 Mod. 74, 130; 11

East, 374; Id. 571; 2 Campb. 258; 2 B. & Cres. 934; 4 D. & R. 518; *ante*, 89.

(*x*) 7 & 8 Geo. 4, c. 29, 30.

a certificate to kill *snipes* or *quail*, (*y*) and subjects persons who trespass in pursuit of them to the same penalties as if in the pursuit of game, (*z*) and makes it penal to take out of the nest or destroy the *eggs* of any *swan*, *wild duck*, *teal*, or *widgeon*, or have the same in his possession or controul; (*a*) yet it contains no protection in favour of decoys, or of wild fowl themselves.

27. *Rookery*. However long established this may have been, neither the common nor the statute law contains any particular regulation relating to the same, other than the general law against trespass; and no action is sustainable for shooting on a party's own land so near to a rookery as to prevent rooks from continuing to build and breed in an adjoining rookery. (*b*) It is scarcely necessary to observe, as a precautionary measure, that all new rookeries should be created in a central situation, away from the land of others.

28. *Land covered with water* (including *ponds*, *watercourses*, *rivers*, and *water* generally,) and *fish* and *fisheries* therein. The legal view of water and fish therein, and of interests relating to the same, are various. If the interest is in the *soil or land*, as well as in the water upon the same, then it is *corporeal* property with all its incidents. But if the interest be merely in the *water*, it is then considered to be *incorporeal* property, and merely as a right or liberty to the *use* of the water in the place, or to the fish which may happen to be therein. The distinction will be found exceedingly important. (*d*) The interest or property in *land*, and the water over the same, is not technically to be described as *water*, or as a *river*, or *rivulet*, or *watercourse*, but as "so many acres of land covered with water;" (*e*) though ejectment or trespass lies for "a pool," or "pond," or "pit of water," or "a gulf," (*f*) or for "a several fishery," because those terms import an ownership as well of the *water* or *fish* as of the *land*. (*g*) By a grant in a deed merely "of *water* in such a place," nothing passes but a right of *fishing*. (*h*) But by the grant of a *several*

28. Ponds, watercourses, rivers, water, fish, and fisheries in general. (*c*)

(*y*) 1 & 2 W. 4, c. 32, s. 5.

(*z*) *Id.* s. 30, 31.

(*a*) *Id.* s. 24. But perhaps 7 & 8 Geo. 4, c. 30, s. 24, would extend to any wilful injury to a decoy.

(*b*) 2 Bar. & Cres. 934; 4 Dow. & Ry. 518; and see 2 Campb. 258; 11 East, 514; *ante*, 89.

(*c*) See *post*, "Watercourses."

(*d*) If a wharf be demised with the *use* of the *water* of a *river* adjoining the same, and not of the *soil* of the *river*, no distress for the rent of the wharf can be made upon a barge of the tenant on the adjoin-

ing water, *Buzzard v. Capel*, 8 Bar. & Cres. 141.

(*e*) *Yelv.* 143; *Co. Lit.* 4, a; 1 Thomas's *Co. Lit.* 213; 2 Bla. C. 18, 19.

(*f*) A *precipe* lies of these, and the taking of the *esplees* may be of *fishes*, 1 Thomas's *Co. Lit.* 213.

(*g*) *Co. Lit.* 4, b. 5, b. 122, a; 1 Thomas's *Co. Lit.* 213; *Yelv.* 143; 2 Salk. 637; *Cro. Car.* 554; 2 Hen. Bla. 182; 5 Bar. & Cres. 897.

(*h*) *Co. Lit.* 4; 2 Bla. C. 19; *Shep. T.* 97.

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fishery, which may be accompanied with livery of seizin, something territorial passes, though precisely what is not well defined. ⁽ⁱ⁾ And by a grant of "our fishery of the halves and halven doles, with the fishings called Unlawater, with the appurtenances to the halves due and accustomed," something territorial passes; and the halves and halven doles are in the nature of land, or some local limit within which the fishery connected with the soil is to be exercised; and it therefore follows, that such an estate or interest is rateable to the poor. ^(k) Mere water is considered to be of a moveable nature, continually changing, at least by absorption and renovation, especially in a river, and therefore water itself by that name has no permanency or durability, the essential properties of corporeal real property. ^(l) If, therefore, a person have merely an interest in water or a watercourse, which is rather the use of the water which may happen to be in a particular place, and not in the land under it, he should describe it accordingly, and his remedy for any injury or deprivation cannot be trespass or ejectment, but must be an action on the case for the *consequence* of the injurious act; ^(m) he could not complain of taking from or adding too much to a watercourse, as of itself a direct and immediate injury, as in the case of trespass to land, but must allege and prove that he thereby sustained some consequent damage; as the reduction of the power in working his mill, or the loss of the use of the water for his cattle, or that his land or banks became injured; ⁽ⁿ⁾ though, perhaps, the subtraction or any alteration of water in a *fishery* would actually produce, or be inferred to produce, some injury sufficient to sustain an action. ^(o)

The distinction between an interest in land and a mere interest in the water over it is material. Thus, if a wharf be demised with the use of the water in an adjacent river, unless the soil of the river also be demised, a barge of the lessee upon the water, though attached to the wharf with ropes, could not be distrained for rent in arrear, because neither the water nor the bed of the river are parts of the thing demised. ^(p) So the owners merely of a *navigation*, although they have a dam placed thereon, are not rateable to the poor, because they have no interest in the soil, and therefore are not the occupiers of "lands

(i) 1 Co. Lit. by Thomas, 199.

(k) 1 Maule & Sel. 652; Chit. Game L. 306.

(l) Yelv. 143; Co. Lit. 4, a; 2 Bla. C. 18, 19.

(m) Yelv. 143; 2 Bar. & C. 910; 6 Price's R. 1; 7 Moore, 354; 6 East, 208;

1 B. & Ald. 258.

(n) *Williams v. Morland*, 4 Dow. & Ry. 463, *post*, 192, notes (y), (z).

(o) 6 East, 208; 7 East, 195; 1 Wils. 175; on principle, a very small damage would suffice, 2 East, 154.

(p) 8 B. & Cres. 141.

or houses" within the 43 Eliz. c. 2, s. 1. (q) And this is one reason why canal shares, being mere interests in a navigation, and not in the soil, do not in general entitle a person to vote for members of parliament; (r) and Commissioners of Sewers, having no interest in the soil, cannot maintain trespass even for injuries to their works. (s)

The respective interests in a *several* fishery, *free* fishery, and *common* of fishery, the two last of which are only *incorporeal* rights, will be more properly considered amongst other incorporeal hereditaments. It is proper, however, here to observe, that when a river or watercourse *not navigable* divides the property of distinct owners, the inference is, in the absence of proof to the contrary, that the ownership of the soil of such watercourse, and of the fishery thereon, belongs separately to the owners of the land upon each side, to the centre of the watercourse, *usque ad medium filum aquæ*. But not so in the case of a navigable river. (t)

Every owner of land on the banks of a *river* or smaller watercourse has, *primâ facie*, an equal right to the use of the water, and one cannot acquire a right to throw the water back on the proprietor above, or to divert it from the proprietor below, without a grant from all the other proprietors, or twenty years' enjoyment, which is evidence of a grant, (u) and such twenty years uninterrupted enjoyment is now secured by the provisions of the 2 & 3 Wm. 4, c. 71. It has been supposed that any one might divert a part of the water of a river or watercourse to his own use, so that he did not injure any *present* works of another on the same stream. (x) But that doctrine must be received with

(q) *Rex v. Aire and Calder Navigation*, 3 Bar. & Adolp. 139; 9 B. & Cres. 114, 820.

(r) *Ante*, 95. With regard to shares in a navigable river or canal, the legislature has, in many cases, declared them to be *real* property; in others, where no such express declaration has been made, but where the shareholders, in respect of their shares, are actual proprietors of the soil, or where they have such rights arising in and out of the soil as amount to an incorporeal hereditament, the law considers them *real* property, so as to give a right of voting, 2 Ves. jun. 652; 1 B. & C. 546; *id.* 551; 9 B. & C. 128; Rog. Elections, 116.

But if such shareholders are, by act of parliament, declared to be a corporate body, they cannot vote, Heywood's Law of Elections, 71; 2 Peck, 113; *id.* Gloucester, 136. So also held the revising barrister at Reading, 1832. The decision of the re-

vising barristers in the case of the Kennet and Avon Navigation shareholders. When the shares are declared to be *personal* estate, they are to be considered as *bona notabilia* in the diocese in which the canal lies, and probate may be properly obtained from the bishop of that diocese, 7 B. & Cres. 632.

(s) 2 J. B. Moore, 666, *post*.

(t) *Rex v. Smith*, 2 Dougl. 411; and see *post*, 192, note (x); see *post* as to the ownership of soil adjoining a high road.

(u) *Wright v. Howard*, 1 Sim. & Stu. 190, cited and confirmed in *Mason v. Hill*, 3 Bar. & Adolph. 304; *post*, 192, note (x); and see 2 Bar. & C. 910; 4 D. & R. 583; 1 Camp. 463; 6 East, 208; 1 Wils. 174; 1 Bar. & Ald. 258; 5 Taunt. 454; 4 East, 107; 7 Bing. 692.

(x) *Bealey v. Shaw*, 6 East, 207; and per Tindal, C. J. in *Liggins v. Jugs*, 7 Bing. 694, 695; but see 1 B. & Adolph. 874; 3 *Id.* 304; *post*, 192, note (x).

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qualification, for although no particular individual can sue for an alteration in a watercourse, unless he can show that it has occasioned some actual injury to himself; (y) yet, if afterwards, and within twenty years, although *subsequent* to such alteration, any person entitled to the use of the watercourse in its natural state should think fit to erect works, or otherwise to begin to use the watercourse as he was *originally* entitled to do, and find that the antecedent alteration then prevents him from so doing, or from enjoying his privilege as fully entitled, he may then sustain an action for the interruption of his right, then, for the first time, beginning to produce an actual injury. (z)

Criminal in-

As respects the *criminal* law, special provisions have recently been enacted, varying the punishment for criminal injuries of different descriptions to *water and watercourses and fisheries*, whether in the nature of larceny or of malicious injuries, and which we will now notice. (a)

Fisheries and fish. As respects injuries in the nature of larceny, it is provided that if in any *water* which shall run through or be in any *land adjoining or belonging to the dwelling-house* of any person being the owner of such water, or having a right of fishing therein, any person unlawfully and wilfully take or destroy any fish, he is guilty of an *indictable misdemeanor*.

(y) *Williams v. Morland*, 2 Bar. & Cres. 910; but note that in *Mason v. Hill*, 3 Bar. & Adolph. 312, Ld. Tenterden seems to have suggested whether that principle should have been admitted. It will be observed, however, that the principle is correct. A commoner cannot sue for a trespass on a common without averring and proving some consequent damage, however small, 2 East's R. 154.

(z) *Mason v. Hill*, 3 Bar. & Adolph. 304. The court in that case held that the proprietor of lands contiguous to a stream may, as soon as he is injured by an antecedent diversion of the water from its *natural course*, made within twenty years, maintain an action against the party so diverting it: and that it is no answer to the action that the defendant *first appropriated* the water to his own use, unless he had twenty years undisturbed enjoyment of it in the altered course. The Court quoted the judgment of the Master of the Rolls in *Wright v. Howard*, 1 Sim. & Stu. 190, as expressed in language most perspicuous and comprehensive. "The right to the use of water rests on clear and settled principles: *Prima facie*, the proprietor of each bank of a stream is the proprietor of half the land covered by the stream, but there is no property in the

water. Every proprietor has an equal right to use the water which flows in the stream; and consequently no proprietor can have the right to use the water to the prejudice of any other proprietor. Without the consent of the other proprietors, who may be affected by his operations, no proprietor can either diminish the quantity of water which would otherwise descend to the proprietors below, nor throw the water back upon the proprietors above. Every proprietor, who claims a right either to throw the water back above, or to diminish the quantity of water which is to descend below, must, in order to maintain his claim, either prove an actual grant or license from the proprietors affected by his operations, or must prove an uninterrupted enjoyment of twenty years: which term of twenty years is now adopted, upon a principle of general convenience, as affording conclusive presumption of a grant." The learned judge then adds, that an action will lie "at any time within twenty years, when injury happens to arise in consequence of a new purpose of the party to avail himself of his common right." See also 1 B. & Adolph. 374.

(a) 7 & 8 Geo. 4, c. 29, s. 34, 35, 36; Id. c. 30, s. 12, 15, 24.

The term "*belonging to a dwelling-house*" seems very loose and uncertain. (b)

The illegally taking or attempting to take or destroy any fish "in *any water*, not being such as aforesaid, but which shall be *private property*, or in which there shall be any *private right of fishery*," is an offence punishable summarily before a justice with 5*l.* penalty. (c)

But if any person shall, by *angling in the day time*, take or attempt to take or destroy any fish in such first mentioned water, he shall, on conviction before a justice, forfeit 5*l.*, and if in the last mentioned water, then 2*l.*; and a power is given to seize the rods, lines, hooks, nets, and other implements, for the use of the owner; but which seizure exempts the offender from the payment of any damages or penalty for such angling. (d)

28. The *maliciously* breaking down or destroying the dam of any *fish-pond*, or of *any water* which shall be *private property*, or in which there shall be any *right of private fishery*, with intent thereby to take or destroy any of the fish in such pond or water, so as thereby to cause the loss or destruction of any of the fish; or the maliciously putting any lime or other *noxious material* in any such pond or water, with intent thereby to destroy any of the fish therein; or maliciously breaking down or otherwise destroying the dam of any mill-pond, is an *indictable misdemeanor*, punishable with transportation for seven years, or imprisonment for two years, and whipping, if a male offender. (e)

29. *Oyster Bed, Laying or Fishery.* The stealing any oysters or oyster brood from any oyster bed, laying, or fishery, being the property of any other person, and sufficiently marked out or known as such, is *larceny*; and the using any dredge, or any net, instrument, or engine whatsoever within the limits of any such oyster fishery, for the purpose of taking oysters or oyster brood, although none shall be actually taken, is an indictable misdemeanor, punishable with fine of 20*l.*, or three calendar months' imprisonment, or both, as the court shall award. (f)

30. *Hedges, Fences and Ditches.* When these are external, and separate the properties of distinct owners, the rule appears to be, that if there be two adjacent fields separated by a hedge

28. Fish-ponds
and dams.

29 Oyster
beds.

30. Hedges,
fences and
ditches.

(b) 7 & 8 Geo. 4, c. 29, s. 54; and see the decision on the word "*adjoining*," ante, 178, 179.

(c) *Id.* *ibid.*

(d) *Id.* s. 35.

(e) 7 & 8 Geo. 4, c. 30, s. 15.

(f) *Id.* c. 29, s. 26.

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and ditch, the hedge and bank *primâ facie* belong to the owner of the field *immediately* adjoining the same; and if there are two ditches, one on each side of the hedge, then the ownership of the hedge must be ascertained by proving acts of ownership. (g) In other words, in the first instance, and in the absence of express evidence of the original formation of the hedge or ditch, or of acts of ownership, the inference is, that the party originally resolving to fence his land, dug his ditch at the extreme boundary of such land, so as to exclude very little, if any, part thereof; and that he threw the excavated earth *inwards*, towards and upon his own land, and then planted or erected a thorn quick or paling upon the ground thus elevated. (h) It has been held, that if a person have a field fenced with a bank and ditch, it is not a necessary consequence that his rightful ditch properly extended to the width of *eight feet* from the interior line of the foot of the bank, *i. e.* four feet for the base of the bank, and four feet for the ditch; (i) but proof of the ancient width of the ditch is evidence that the owner's land did not extend beyond the *outer* edge of it, and that he has no right to cut away his neighbour's land for the purpose of widening the ditch, (j) nor would it be lawful to dig a deeper ditch, if the consequence would be the giving way and sinking of part of the neighbour's ground. (k)

Twenty years' possession and reparation of a boundary or division hedge or ditch, by an owner in fee, affords presumptive evidence of a continuing *legal obligation* to repair, and he or his tenant (on whom, as occupier for the time being, the obligation to repair devolves,) would afterwards be compellable to repair, and if he should omit to do so, he would be liable for any consequential damage in several respects; as *first*, to an action of trespass; if his cattle, through any defect in his fence, escape

(g) *Per* Bayley, J. *Guy v. West*, 2 Selw. N. P. 1287.

(h) *Semble*, 3 Taunt. 137; and see observations of Holroyd, J. in *Doe v. Pearsley*, 7 Bar. & Cres. 307, 308.

(i) 3 Taunt. 137.

(j) *Id.* *ibid.*

(k) *Semble* with respect to *park paling*, and other upright *wooden* fences, the usual course is to place the same on the extreme outside or boundary line of the owner's property, when adjoining that of another; and, as it is termed, to drive the nails homeward, that is, to place the pales on the flat surface of the rails, and to drive the nails towards the owner's land, so as to present the flat and even surface towards the neighbour's land, and thereby

prevent persons getting over, which they otherwise might do, by stepping on the rails; and this practice, in otherwise doubtful cases, will assist in deciding upon the ownership of the fence, and of the land on which it stands, but not universally so, for at the time the fence was erected, the neighbour might have refused permission to enter his land, and thereby have compelled the party making the fence to work only upon his own land, and thereby necessarily reverse the above order of proceeding; and, in that case, the inference would be that the boundary line of the land, and of trees growing in the fence, was the external side of the posts to which the rails were fixed. As to a *wall*, see 8 Bar. & Cres. 257.

from his own land into that of his neighbour; and also his cattle, whilst so illegally therein, might be taken as a distress; *secondly*, to a special action on the case for any trouble, damage or loss, that a neighbour might sustain by his cattle escaping out of his own lands into those of the owner of the defective fence, and there receiving injury; and *thirdly*, he could not complain of any trespass or damage done upon his own land by cattle escaping from that of his neighbour, nor could he legally take them as damage feasant. *(l)* Again: as between owners *in fee* of fences, there is an ancient specific remedy, which, though now out of use, would be highly useful to revive in practice, viz. a writ "*curia claudenda*," compelling the owner *in fee* to repair his defective fence. *(m)*

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31. The general presumption of law is, that waste land, which adjoins to a public turnpike or other road, and lies between such road and the fence of inclosures near to the same, belongs to the owner of the adjoining inclosed land, whether he be a freeholder, leaseholder, or copyholder, and not to the lord of the manor; *(n)* but this presumption may be, and frequently is, rebutted by proof of acts of ownership by the lord of the manor or other owner of the adjacent property, such as cutting and taking valuable timber trees to his own use, or cutting large quantities of bushes, or other acts, when the latter cannot be ascribed to the exercise of a mere right of common. *(o)* So where highways or lanes, or narrow strips of land, divide the private inclosed lands of different owners on each side, the legal inference, in the absence of proof of acts of ownership to the contrary, is, that the ground on each side, to the centre of such highway, lane or land, *ad medium filum rive*, belongs to the owners of the land, whether freehold or copyhold, *ex utraque parte*. *(p)* But this presumption does not affect the soil of a highway set out over a common under an inclosure act, where, previous to the inclosure, only the lord of the manor was owner of the whole soil; *(q)* nor does it affect land immediately on the outside of a fence adjoining a large waste or common, in which case such land is presumed to belong to the

31. Boundary line, where land adjoins an highway, lane or common.

(l) 1 Salk. 335; 1 Ld. Raym. 273; 2 Y. & J. 391; 1 B. & Ald. 59.

(m) Fitz. N. B. 128; 1 Salk. 128; Vin. Ab. Fences, *Curia Claudenda*; and see chap. ix. post, *Specific Relief*.

(n) Doe v. Pearseley, 7 Bar. & C. 304;

2 Stark. Rep. 463.

(o) Per Littledale, J., id. ibid.

(p) Com. Dig. Chemin; 7 Taunt. 39; 2 Stark. 463; Loft, 358; Stark. Ev.

2 Mood. & M. 32; 7 B. & Cres. 304.

(q) 2 Mood. & M. N. P. C. 24, 32.

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Boundaries of
estates, expedi-
ency of ascer-
taining them in
certain cases. (t)

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ries to hedges
and fences, and
walls, &c.

owner of such waste; (r) and in Kent there is a right called land peage to the same effect. (s)

Where a tenant or other person in the occupation of an entire estate, or of two estates belonging to different owners in fee, has *confounded* or *confused* the external boundaries, or where freehold and copyhold lands lie intermixed, and the exact division of the two has become doubtful, and more particularly with reference to the distinct titles to two estates, one of which the owner wishes to sell, it may become essential to ascertain the precise boundary, which must be done by obtaining in equity a commission to settle the same, or by an issue at law, but the necessity for such a proceeding should be carefully avoided, by the owner from time to time ascertaining and marking, in the presence of young witnesses, ancient marks, and taking care to keep up such ancient marks and divisions between copyhold and freehold, and his own and neighbour's property. (u)

Criminal injuries to hedges and fences are punishable by several recent acts, but less severely than formerly. The cutting, breaking or throwing down, with intent to *steal*, any part of any live or dead fence, or any wooden post, pale or rail, set up or used as a fence, or any stile or gate, or any part thereof, is punishable summarily before a magistrate, with the forfeiture, for the *first* offence, of the value of the article stolen, and not exceeding 5*l.*; and for a *second* offence, a year's imprisonment; and for any *subsequent* offence, the additional punishment of whipping may be inflicted. (x) And if upon *searching*, any such article of the value of 2*s.* shall be found in possession of a person, and he do not show that he came lawfully by the same, he is to pay the value of the article, and not exceeding 2*l.* (y) *Malicious* injuries of a like nature, but without proof of an intent to *steal*, to any such article, or to a *wall*, subjects the offender to pay the amount of the injury done and 5*l.* penalty; and for a second offence, imprisonment for a year; and for any *subsequent* offence, the additional punishment of whipping. (z) For *small* wilful or malicious injuries to fences, not exceeding 5*l.* damages, the summary remedy before a justice is provided by the same act, but which does not apply to a case of merely

(r) 7 Taunt. 39.

(s) Rob. Gavelkind.

(t) As to inclosures of parts of a waste and to whom they belong, see *post*, under *Tenure*.

(u) See *post*, chap. viii., and 1 Mad.

Ch. Pr. 29, 30; 5 Taunt. 167; 1 B. & Ald. 428; 3 Thomas's Co. Lit. Index, tit. *Boundaries*.

(x) 7 & 8 Geo. 4, c. 29, s. 40.

(y) Id. s. 41.

(z) Id. c. 30, s. 23.

carrying away part of a fence, but only to the party damaging the same. (a)

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32. *Navigable Rivers, Creeks and Canals, Quays, Docks and Wharfs.* It is important to have an accurate knowledge of the nature of these, and the rights therein, as well regarding the liability to the poor rates and the criminal law, as also respecting other incidents. As respects the poor rate, if the interest be merely in the *navigation* of the river, creek or canal, without any exclusive interest in the soil, then no poor rate can be imposed upon the proprietor of the navigation, however profitable; but if he also have a substantial interest in the soil or land, over which the water passes, so that he might maintain *trespass*, it is otherwise; the former is a mere easement and incorporeal right, the latter an interest in the land, and as such rateable; (c) and when rateable, is to be at a sum which, if let, a tenant would give per annum as rent. (d) In the case of *docks* and *wharfs*, the owner and occupier necessarily are in possession of land, and consequently they are rateable at their annual value, thus improved and increased by the mode of occupation. (e) So also any lands or buildings occupied by a canal company are rateable. (f) It is not a legal presumption, that the owners on each side of a *navigable* river are entitled to the soil of the bed of the river to the centre, (g) though it may be so in a river not navigable, (h) The rights to dock dues, tolls, &c. are frequently regulated by particular statutes, and in that case there is no common law right to be implied to receive other remuneration than that prescribed, however reasonable. (i) So most canals are under modern acts placed under the management of companies of adventurers, and who frequently have power to widen and deepen the same, even after it has been completed. (j) The liability to repair the banks of a river is affected by the same rules as relate to sea walls and banks. (k) In general, commissioners of

32. Navigable rivers, creeks, canals, quays, docks and wharfs. (b)

(a) *Rex v. Harper*, 1 Dowl. & R. 223.

(b) As to *quays* in general, see Dean Tucker on Trade, 116, 117; 2 Chit. Com. L. 134; Eq. Dig. tit. *Canals*, and *ante*, 95; *post*, as to *voting*. Sometimes the shares in a canal are expressly declared to be *personal* property, but still the property may be considered as locally arising in the county or diocese in which the canal lies, and therefore if a shareholder die, a probate granted by the bishop of that diocese will be proper, *Ex parte Horne*, 7 Bar. & C. 632.

(c) 9 Bar. & C. 25, 114, 820; 3 B. & Adol. 139.

(d) 1 B. & Adol. 932, 933.

(e) 1 T. R. 219; 5 M. & S. 394; Burn's J., Poor, 95 to 101.

(f) 1 B. & Ald. 263, 289; 5 Bar. & C. 473.

(g) *Ante*, 191; 4 Burr. 2163; *Rex v. Smith*, 2 Dougl. 411; because a right to *corporeal* property cannot be prescribed for, or be appendant or appurtenant, *ante*, 154.

(h) 4 Burr. 2163, *ante*, 191.

(i) 8 Bar. & C. 42.

(j) 7 Bar. & C. 722.

(k) *Post*, 199; Co. Lit. 53, l; 3 Thomas's Co. Lit. 256, note F.

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ries.

sewers and owners of canals merely have jurisdiction over them, and not possession, and therefore commissioners of sewers cannot sustain an action of trespass for any supposed injury to a sewer or watercourse. (*l*)

With respect to *offences* of a *public* nature to navigable rivers, it has been held, that though an erection for pleasure, whim or caprice, which interferes in the least degree with a public right of passage, is an indictable nuisance; yet if it be erected and continually applied for the purposes of *trade and commerce* to an extent beneficial to the interest of the country generally, it is a justifiable erection, and not a nuisance. (*m*) But to divert a part of a navigable river, whereby the current is so weakened as not conveniently to carry along the same vessels of the same burthen as before, is indictable. (*n*) And the right of fishing therein is subservient to the right of navigation. (*o*) However, the owner of a vessel sunk by accident in such river is not indictable for not removing it; (*p*) though he is bound to place a buoy there to prevent mischief. (*q*)

The stealing "any goods or merchandize in any vessel, barge or boat, in any port of entry or discharge, or upon any navigable river or canal, or in any creek belonging to or communicating therewith, or from any dock, wharf or quay adjacent to such port, river, canal or creek," is particularly punishable, and consequently the particular description of those places may frequently become material. (*r*) The repealed act 22 Geo. 2, c. 45, was confined to the stealing such goods as were *usually* lodged in ships or on wharfs and quays, (*s*) and it has been suggested that the same decision would affect the present act, (*t*) and it was considered that stealing goods from a vessel *aground* in a dock, in a creek or river, would not be within the former act. (*u*)

33. Bridges. (*1*)

33. *Bridges*. These may be public or private property, and though a bridge built by a private individual may have been dedicated to the public, yet, subject to the use of it by the public, the right to the soil on which it stands, and the mate-

(*l*) 2 J. B. Moore, 666; 8 Bar. & C. 42, *ante*.

(*m*) 6 Bar. & C. 566; Lord Tenterden, *diss.*; see Wellbeloved, in his Treatise on Highways, p. 449, and 2 Stark. R. 511; but see 1 B. & Adolp. 441, 874.

(*n*) Hawk. c. 75, s. 11; but see 1 B. & Adolp. 874.

(*o*) 1 Campb. 517.

(*p*) 2 Esp. R. 675.

(*q*) 1 Campb. 515.

(*r*) 7 & 8 Geo. 4, c. 29, s. 17.

(*s*) Fost. 79; 1 Leach, 52; 2 East's P. C. 647.

(*t*) 3 Burn's J., Larceny, 577, *sed quare* Leach, 341, and Collyer's Statutes, 338; Fost. 77.

(*u*) Leach, 357; but the present act contains the words "in any creek, &c."

(*v*) See in general, Burn's J., Bridges; Chitty's Coll. Stat. Bridges.

rials of which it has been constructed, may still be in a private individual, so that he might sustain ejectment for the soil, or trespass for other injury. (x) The maliciously pulling down or destroying, or injuring with intent to render dangerous or impassable, any public bridge, is felony, transportable for life or seven years, or imprisonment not exceeding four years, and whipping; (y) and other inferior wilful or malicious injuries are punishable summarily before one justice, and 5*l.* penalty; (z) and different injuries to the materials of a bridge, in the nature of larceny, would be punishable under the Larceny Act, 7 & 8 Geo. 4, c. 29.

• 31. *Sea Banks and Walls.* The shore between high and low water mark usually belongs to the lord of the adjacent manor, as owner of the waste and other property not appropriated to individuals, and he may maintain trespass for digging or taking gravel or stones or other materials from that part of the shore, (b) and the owner may support trespass against persons passing with machines over the beach to bathe, without his leave. (b) The owner of land adjoining the sea-shore may legally erect a groin to protect the same from the inroad of the sea, though he may thereby render it necessary for his neighbour to do the like; (c) though he could not legally do so there or in a river, so as to change the usual course of the water and throw it in a new direction upon his neighbour's land, and thereby occasion deluvium. (c) If an individual suffer particular loss by an individual or corporation omitting to repair sea walls, in pursuance of a grant from the crown, or in respect of any other liability, he may sustain an action, (d) and the insufficiency of the corporate funds would not afford any defence, (e) and although if the damage were wholly attributable to a peculiarly high tide, or the act of God, that would be a defence, it would be otherwise if the sea wall or bank were at the time in decay, and probably the damage was partly attributable to that cause. (e)

31. Sea banks and walls. (a)

It has been finally settled in the House of Lords, that land *not suddenly derelict*, but formed by *alluvion* of the sea, *imper-*

(x) 6 East, 154; 2 Inst. 705; see further, Burn's J., Bridges.

(y) 7 & 8 Geo. 4, c. 30, s. 13; and see other particular provisions, 2 Russ. 17, 19, n.

(z) Id. s. 24.

(a) See in general, 1 Thomas's Co. Lit. 47, in notes; Id. Index, tit. "*Juris Maris*," and tit. "*Sea*."

(b) 5 B. & Ald. 268; 2 B. & Adolp. 256;

so held in that case, though the report only relates to the admissibility of witnesses.

(c) 8 Bar. & C. 355; 3 Wils. & Sh. 235; 1 Dow's Rep. 178; 1 Sim. & Stu. 190; 2 Bar. & C. 910, *post*. See 1 B. & Adolp. 874, 888.

(d) 5 Bing. 911 to 913; Co. Lit. 53, 54; 3 Thomas's Co. Lit. 236; id. note F.

(e) Id. *ibid* : 1 Bar. & C. 477.

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ceptible in progress, belongs to the owner of the adjoining demesne lands, and not to the crown. (*f*) But if there be a sudden derelict of land, the latter belongs to the king. (*f*) Fishing in the open sea, or in any arm thereof, is of common right, and therefore it would be idle and improper to claim the right by prescription or custom. (*g*) But the *exclusive* right to fish may be prescribed for. (*h*)

35. Ports and
harbours. (*i*)

35. *Ports and Harbours* are in general more matter of public than of private concern. It has been held that if a party bound to repair the same omit doing so, a third person, injured by the neglect, must request him to repair, before he can legally do so himself. (*k*) Frequently, by modern acts, ports and harbours are vested by act of parliament in certain persons incorporated and invested with certain privileges; and in that case the statute usually prescribes and limits the rights and duties relating to the management of such port or harbour. (*l*)

36. Light-
houses, bea-
cons, and sea-
marks. (*m*)

36. *Light-houses, Beacons, and Sea-marks.* The power of erecting these was originally vested in the king; (*n*) but at present the erection of light-houses, and other establishments of the same nature, usually take place under the authority of acts of parliament. The principal act is the 8 Eliz. c. 13, which delegates general and extensive powers to the Trinity House. (*o*) The exhibiting any false light or signal, with intent to bring a ship into danger, is punishable capitally. (*p*) The other regulations in that act, and in 7 & 8 Geo. 4, c. 29, against larceny, would extend to these as to other "*buildings*" not particularly named.

37. Highways
and turnpike
roads. (*q*)

37. *Highways and Turnpike Roads* are principally of public, but very frequently also of private concern, excepting that in general, subject to the right of way, the *presumption* is, that the soil, mines, and trees, belong to the owner of the adjacent land, whether freehold or copyhold, *ex utraque parte, usque ad*

(*f*) 3 Bar. & C. 91; 5 Bing. 163; and see *Scultes on Aquatic Rights*; 1 Thomas's Co. Lit. 47, in note.

(*g*) Willes, 268; 2 Bos. & Pul. 472.

(*h*) 4 T. R. 439.

(*i*) See in general *Hale De Port Mar.*; 1 Hargreave, 46, 73; 2 Chit. Com. L. 2 to 32; 1 Thomas, Co. Lit. 47, 48, in notes.

(*k*) 2 Bar. & Cres. 302; 2 Dow. & Ry. 550.

(*l*) 8 Bar. & Cres. 42.

(*m*) See in general 2 Chit. Com. L. 33 to 46; Burn's J., Ships; 1 B. & Adolp. 509.

(*n*) 4 Inst. 148; 12 Co. 13; 4 M. & S. 291.

(*o*) See 2 Chit. Com. L. 34, 35.

(*p*) 7 & 8 Geo. 4, c. 30, s. 11.

(*q*) See in general Burn's J., Highway; Chit. Col. Stat. Highway, with notes; 2 Crim. L. 127, &c.

filum viæ, (r) unless where a road has been set out over a waste under an inclosure act; (s) and when the owner of the adjacent land is entitled to the soil of the road, he may support trespass or ejectment for any injury to the soil, or for an ouster. (t) If the highway be not thirty feet wide, two or more justices may order it to be widened, and to take for that purpose adjacent land, but not so as to pull down any house or building, or to take away the ground of any garden, park, paddock, court or yard; and for which compensation is to be agreed or assessed by a jury, and paid, before the land can be taken. (u) All injuries to any highway are public nuisances at *common law*, and in general indictable as such; (x) such as the common practice of ploughing up a public footpath across an arable field, (y) suffering adjacent ditches to be foul, or trees to grow over; (z) and it seems clear that any person might justify lopping such trees so far as to avoid the nuisance. (a) But these and other nuisances are by the Highway and Turnpike Acts removeable or punishable by summary proceedings: and in general notice is required to the occupier himself to remove the nuisance, before another person can interfere. (b) Mere temporary obstructions are not indictable when absolutely necessary; but if otherwise, they are so. (c) Thus the erecting a scaffold to repair a house to a reasonable extent, or the unloading a cart or waggon, and the delivery of any large articles, as casks of liquor, if done with as little delay as possible, are lawful; though if an unreasonable time were employed in the operation, they would become nuisances. (e) And on repairing or rebuilding a house, care must be taken that the incroachment on the highway be not unreasonable. (d) And a timber merchant, although only occasionally cutting logs of wood in the street, and which he could not otherwise convey into his premises, would not be excused by the necessity which, in choosing the situation, he himself created; (e) but the removing them promptly, and not suffering them to remain on the highway an unreasonable time, would excuse him. (f) So if stagecoaches, carts, or other carriages,

(r) *Ante*, 195, 6; 7 B. & Cres. 304; 2 Stra. 1044; 1 Burr. 143; 9 B. & C. 95, 114; 3 Bla. C. 413; 4 Bing. 448; 2 Hen. B. 527; 11 East, 51; 2 Stark. R. 46; 7 Taunt. 39; 11 Price, 736; but that presumption must not always be relied upon, and other evidence should, if possible, be adduced, Holt, C. N. P. 463.
(s) *Ante*, 195, n. (g); but see 11 Price, 736.

(t) *Supra*, note (r).

(u) 13 Geo. 3, c. 78, s. 16.

(x) Hawk. c. 76, s. 48.

(y) 3 Campb. 226.

(z) Hawk. c. 76, s. 50; Burn's J., Highways, XIII. 9.

(a) *Id.*

(b) See Highway Act, 13 Geo. 3, c. 78, s. 6 to 11, 13, 14, 63; and see Turnpike Act, 3 Geo. 4, c. 126, s. 113, 114, 116, 117.

(c) 3 Campb. 231.

(d) 1 Bos. & P. 407.

(e) 3 Campb. 230; 2 Roll. Abr. 137.

(f) *Id.* ib.; Bac. Ab. Highway, E.

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ply or be kept an unreasonable time in a public street, the owner may be indicted. (*g*) And public exhibitions in a street, occasioning a large concourse of people there, would be indictable. (*h*) But a mere transitory obstruction, as distributing hand-bills in a public highway, is not illegal. (*i*) Nor is it indictable to build a house higher than before, whereby the street becomes *darker*. (*j*) But these and other matters of the like nature are now usually regulated by particular local acts, as in those relating to the metropolis. Offences of a *criminal* nature to highways and turnpike roads, are in general punishable under the particular provisions of the general Highway or Turnpike Acts or local acts. A *small* nuisance occasioned by an act producing *great* public benefit may be excused. (*k*)

38. Toll-houses,
turnpike gates,
and weighing
engines.

38. *Toll-houses, Turnpike Gates, and Weighing Engines.*

These are a description of corporeal property fixed to the realty, as the places and means of securing the receipt of the principal property, which is *incorporeal*, viz. tolls and penalties for their nonpayment. These are usually regulated and protected by the general highway (*l*) or turnpike acts (*m*) or by local acts. The occupation of them does not create a settlement. (*n*) The interest in these is usually vested in the trustees of the turnpike roads, or the mortgagee of the toll and toll-houses; and if the trustees should have no power under their local act to mortgage the toll-houses, they being trustees for the public, will not be estopped from disputing their power to mortgage, and may therefore support ejectment against their own mortgagee. (*o*)

Criminal injuries to these are punishable under the 7 & 8 Geo. 4, c. 30, s. 14, which enacts that if any person shall maliciously throw down, level, or otherwise destroy, in whole or in part, any turnpike gate, or any wall, chains, rail, post, bar, or other fence belonging to any turnpike gate legally erected, or any house, building, or weighing engine, legally erected, he shall be guilty of a *misdemeanor*, and punished accordingly.

39. Rail roads,
waggon roads,
trucks, &c. (*p*)

39. *Rail Roads, &c.* are highways to be used in the particular manner in which railways are to be used, and subject to the statutes under which they may have been constructed. (*p*)

(*g*) 6 East, 427; 3 Campb. 224.

(*h*) 1 Vent. 169; 1 Mod. 76; Bac. Ab. Nuisance.

(*i*) 1 Burr. 516.

(*j*) 1 Ld. Raym. 737.

(*k*) *Ante*, 198, note (*n*); but see 1 B. & Adolp. 411.

(*l*) 13 Geo. 3, c. 78.

(*m*) 3 Geo. 4, c. 126.

(*n*) 2 Term Rep. 171.

(*o*) See in general Tucker on Trade, 116, 117; 2 Chit. Com. L. 135, 136; 2 B. & Ald. 616; 10 Ves. 92.

(*p*) 2 B. & Ald. 616. See 1 B. & Adolp. 411.

Waggon ways and trucks are particularly named in the Malicious Injury Act, 7 & 8 Geo. 4, c. 30; (q) and the 24th section of the same act would extend to any wilful or malicious injury to a *rail road*; and injuries in the nature of larceny to the iron, or other materials of a rail way, would constitute offences against the 7 & 8 Geo. 4, c. 29, sect. 44.

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II. INCORPOREAL REAL PROPERTY is so termed, because it has no "*corpus*," and is not tangible or visible, nor is the object of the senses, but itself exists only in legal contemplation; though it may *produce* something substantial and beneficial to the owner, as in the instance of the right to tithes, and in that respect it is principally distinguished from corporeal real property, such as land and houses. The corporeal property is the land itself; the incorporeal is merely the right to have some *part* only of the produce or benefit of such corporeal property, or to exercise a right, or have an *easement* or privilege or advantage over or out of it. The possession of corporeal property, as houses and lands, is capable of actual and visible delivery and transfer, and is, therefore, said to lie *in livery* (meaning delivery of seisin) or possession. Whereas incorporeal property is incapable of actual possession, and passes by the mere deed of grant, and is, therefore, said to lie *in grant*.(s) Such as advowsons, tithes, commons, ways, rents, &c. which, together with all other *freehold easements*, must be granted by *deed*, and pass by the execution of such deed, without any actual or supposed delivery of any thing tangible.(t) The instance of an advowson well illustrates the nature of an incorporeal hereditament. It is not itself the bodily possession of the church and its appendages, but is merely the right to give some *other* man a title to such bodily possession. It is not a *jus habendi* but a *jus disponendi*. The right of advowson is not the object of the sight or touch, and

II. INCORPOREAL REAL
PROPERTY, (r)

1. Defined, and in what respects it differs from corporeal real property, and also from personality.

(q) Sect. 6.

(r) See division of subject, *ante*, 145 to 150.

(s) Co. Lit. 9, 172; Com. Dig. Grant. But incorporeal hereditaments will pass by *other* kinds of conveyances than mere grants, as by bargain and sale, Cro. El. 166, covenant to stand seised; 4 Com. Dig. 135; or lease and release, *Id.* ib. 145.

(t) *Id.* *ibid.*; 2 Bla. C. 314, 316. A

lease for any number of years of *land* may even, since the statute against frauds, be created by writing signed by the lessor; but a lease for years of an *incorporeal* thing (as a *several fishery* in the arm of the sea or navigable river) can only be made by lease *under seal*, 5 Bar. & Cres. 875. So a lease of *tithes* must be by deed, or the lessor is still rateable, 4 Man. & Ry. 434; 9 B. & Cres. 479.

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yet it perpetually exists in the mind's eye and in contemplation of law. It cannot be delivered from man to man by any visible bodily transfer, nor can corporeal possession be had of it by the owner, for the latter exclusively belongs not to the patron but to the person whom he has a right to present. The patronage can, therefore, be only transferred by operation of law and grant under seal.(u) The right of advowson, entitling the owner to present to the church, when vacant, an ecclesiastical relative or friend, and reward merit, is of high estimation, and saleable for large sums of money, but the possession of such right can never legally produce pecuniary advantage to its owner, as he cannot sell the next presentation without being guilty of simony when the church is either vacant, or the incumbent *in extremis*;(x) though a sale of the next presentation, the church being then full, is valid.(y)

There are several circumstances in which at common law, and also by statute, *incorporeal hereditaments* differ materially from corporeal real property and also from personalty, and *first* as respects their *creation* and the *modes* of transfer, and the evidence of title. Corporeal real property, before the statute against frauds, passed by verbal feoffment and livery of seisin or possession; whereas a *deed* of grant was always at common law and still is essential to the creation or transfer of a *freehold interest* in any *incorporeal* hereditament or easements, and consequently in general a mere verbal or written authority, not under seal, to present to a living, or to use a right of common or way, or other easement, passes no substantial *permanent* right or interest, but is at most a mere license or excuse, in general revocable at will.(z) Again: a right to or interest in real property *corporeal* cannot be claimed by grant or by prescription, which supposes it, but must be claimed by sixty years' exclusive *seisin*, or by feoffment, or by lease and release, or covenant to stand seised, &c.; whereas as regards *incorporeal* real property, it *must always* have been claimed by custom, or by express or supposed grant, or by

(u) 2 Bla. C. 21, 22; note, it is there stated that an advowson may pass by verbal grant, but that position is clearly erroneous, Co. Lit. 9; 1 Saund. 228.

(x) Cro. Eliz. 685; 19 Vin. Ab. 458; 2 Bla. R. 1052.

(y) 3 Cru. Dig. 33.

(z) 5 Bar. & Cres. 221 to 275; 8 Bar. & Cres. 293; 4 East, 107; 9 Bar. & Cres. 479. It has been well observed, that it is singular how in the teeth of the statute against frauds, 29 Car. 2, c. 3,

s. 1 & 4, it has been held that a *parol license* or agreement may still create a *perfect right* to enjoy an easement. See Sugden, Vend. & P. 8th ed. 73, referring to Sayer's Rep. 3; 8 East, 308, &c. It is equally singular that it should have been settled, that a mere deposit of deeds, without even a written memorandum, shall create an *equitable mortgage*, and consequently in effect a substantial interest in land without writing.

prescription, which supposes such grant; or now, under the important recent act, by alleging the continued enjoyment of the right of common, way, watercourse, use of the water, ancient lights, or other easements, (except tithes, rents, and services) for one of the periods mentioned in the act, viz. sixty, forty, thirty, or twenty years, according to the subject-matter claimed and other circumstances. (a)

Incorporeal hereditaments differ also from corporeal in respect of many of their incidents, privileges, and liabilities. In general, no incorporeal hereditament or mere easement, however valuable, (excepting rents-charge, (b) tithes, and tolls of fairs and markets,) (c) give no right to vote in an election of a representative in parliament.

Nor are the same rateable to the relief of the poor; and it is only under the express terms of 43 Eliz. c. 2, s. 1, that they can be so rated, as in the instance of tithes *impropriate*: and *proportion* of tithes and mere rights of common or way are not rateable. (d)

Some incorporeal hereditaments are capable of being *extended* under an *elegit* the same as corporeal property, as for instance a rent-charge. (e) But not a rent-seck, (f) nor an advowson in gross. (g)

In general, also, incorporeal property having *no corpus*, and not being the object of touch or force, the *remedies* are peculiar; and ejectment, trespass, and trover are inapplicable, unless expressly given by particular statute, as in the case of ejectment for tithes. (h)

With respect to *tenure*, and the modes of acquiring *incorporeal* hereditaments, many of them may, like corporeal real property, be of copyhold tenure. Thus, a fair or a market appendant to a manor may be granted by copy of court roll. (i) So tithes, &c., when the custom will warrant; (k) and many incorporeal things may pass by themselves without land, and without any relation to land, by copy of the court roll. (l)

The rights to most incorporeal real hereditaments *descend* from ancestor to heir the same as corporeal real property, in which respect they differ from personalty, which upon the death

(a) 2 & 3 W. 4, c. 71; see more fully post, tit. *Prescription and Custom*.

(b) If duly registered under 3 Geo. 5, c. 24.

(c) See Wordsworth, Elections, 29.

(d) 9 Bar. & Cres. 827; Burn's J., Poor, 68, 83; see exceptions, ante, 181, 2.

(e) Gilb. Ex. 39; Moor, 32.

(f) Cro. Eliz. 656.

(g) Gilb. Ex. 39.

(h) 2 Stra. 834; Ld. Raym. 191; 52 H. 8, c. 7; Adams' Eject. 18.

(i) Willes, 324.

(k) Id. ibid.

(l) Id. ibid.

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of the owner pass to the executor or administrator for the benefit of creditors or legatees, or next of kin. There is one exception to this rule as regards an advowson, when the executor may be entitled to present, and not his heir, as in the case of an advowson appendant to a manor where the lord dies leaving the church vacant. (m) So with respect to tithes, there cannot be an *ancient* descent, because *laymen* were formerly incapable of holding them before the dissolution of the monasteries. (n) So a devise of incorporeal real tenements or hereditaments must be attested by three witnesses, whereas in the case of personalty and copyhold no attestation is required. (o) In observing upon the words "appendant and appurtenant," we have seen when the different kinds of incorporeal rights to real property may with propriety be claimed as appendant or appurtenant to particular and what descriptions of corporeal real property. (p)

Secondly. Several kinds of incorporeal real property.

Incorporeal hereditaments are of two descriptions, the *first* usually annexed to, or used and enjoyed with, some particular corporeal real property, and either essential to or useful in the enjoyment thereof, such as ancient windows, pews, (q) commons, private ways or private watercourses. The *second* may be enumerated rights wholly unconnected with and independent of the possession or enjoyment of any real corporeal property, such as advowsons, tithes, offices, dignities, franchises, corrodiages, pensions, *annuities*, (r) rents and services, rent-charge, rent-seek, quit rents, fee farm rents, rack rent, and corn and other rents.

1. Ancient
lights. (s)

1. An *ancient window* may be classed under *incorporeal* hereditaments, for the right to the enjoyment of it may be

(m) 8 Bing. 490, 498, 501; 7 B. & Cres. 113; Toller's Exec.; see *post*, p. 217.

(n) See 2 New R. 491, where a rectory in Kent, formerly belonging to one of the dissolved monasteries, having been granted by Hen. 8, to a layman, to be holden in fee by *knight service in capite*, it was held that the lands and buildings thereon were descendible according to the custom of gavelkind, but that the tithes descended according to the common law. See also H. Chitty on Descents, 200.

(o) 29 Car. 2, c. 3, s. 5; but note, that act only names lands and tenements, omitting "*hereditaments*."

(p) *Ante*, 153 to 158.

(q) See 2 Bla. C. 21. It will be ob-

served that Blackstone singularly mentions pews as partaking of personal property, descending by custom.

(r) "*Annuities*" is a term now technically applicable only to such annual payments as are not charged upon or issuing out of land, and cannot therefore be styled incorporeal hereditaments, though so stated by Blackstone.

(s) See in general the cases collected, 2 Chit. Pl. 5th ed. 768, 769, in notes, and see 2 Bla. C. 403, and notes. Blackstone singularly treats the right to an ancient window amongst rights to *personal* property by occupancy. See further, *post*, chap. viii., as to injunctions to prevent the obstruction of an ancient light, and *tit. Prescription*.

defined to be a right to free access of light and air *over land of another person*, adjoining to the building in which the window is placed, so as to prevent the owner of such adjacent land from building or using his land so freely as he otherwise might have done, and precluding him from so enjoying it as to obstruct in any sensible degree the light or air from entering through such window or other apperture. The uninterrupted permission by an owner *in fee* to his neighbour thus freely to use such window for twenty years, at common law, afforded presumption of a *grant* by deed, founded upon adequate consideration, of the free use of the light and air over the land of the adjacent owner through such window, (t) and now by express enactment such long enjoyment creates an absolute and indefeasible right, so that after the lapse of that time no building could legally be erected on the adjacent ground, occasioning any sensible diminution of the light and air, unless it can be shown that the enjoyment originated by a qualified consent or agreement, expressly made or given by deed or in *writing*, so as to exclude the presumption of an absolute grant; and consequently, every owner of property adjoining a window that has not been erected nearly twenty years, should take care within that time either to obstruct it, or have some writing signed by the owner of the window, qualifying his otherwise perfect right. (u) On the other hand, if an ancient window has been shut up for more than twenty years, it loses its privilege, as that nonuser affords a presumption of a release of the prior right. (x) But the circumstance of an ancient window having been built contrary to the Building Act, affords no defence to an action against a private individual for obstructing it. (y) Where the owner of an entire plot of ground builds two or more houses upon it, and afterwards separates the ownership or occupation, each party taking a part impliedly engages not to alter or affect the existing state of the buildings, and in that case even six years, or less, will give as perfect a right to the free use of a modern window, as in other cases twenty years adverse enjoyment would create. (z) The remedies for injuries to ancient windows are abatement of the nuisance or by an

(t) But such a presumption is excluded by the custom of London, 3 Swan. 333. See 1 Mood. & M. 350, as to this custom; but see 2 & 3 W. 4, c. 71, affecting all such customs.

(u) 2 & 3 W. 4, c. 71, s. 3, &c.; 3 Campb. 82. See the statute stated fully, *post*, "Prescription," and in chap. ix. as to Limitations. If the use of the window commenced during a tenancy for life, 11

East, 512, or life of an *ecclesiastical* person, 4 B. & Ald. 579, or a *lease* for years to a tenant, *id. ibid.*, the owner *in fee* will not be affected. The statute also provides for such exceptions.

(x) 3 Campb. 514.

(y) 1 Marsh. 140.

(z) 1 Price, 27; 1 Lev. 122; R. & M. 24; 1 M. & M. 396, 400; 2 Saund. 114, n. 4.

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action on the case, if the obstruction or other nuisance was committed off the land of the owner of the window, or by an action of trespass, if the injury were by fastening a wooden or other obstruction into the owner's wall or window, and the action might be repeated even by a reversioner (a) for every continuance of the nuisance. But when the right to an ancient light is about to be obstructed, the best course is immediately to file a bill, and move a Court of Equity for an injunction to prevent the erection of the injurious building. (b) Where an old house is pulled down wherein were ancient lights, and a new one built, the lights in the new house must, it has been said, be in the same place, and of the same dimensions, and not more in number than the lights in the old house, (c) though it should seem on general principles, that a new building on the same scite would in general be entitled to the same rights as the former (d) It has been held, that if a building, after having been used twenty years as a malthouse, is converted into a dwelling-house, it is in its new state entitled only to the same degree of light as was necessary to it in its former state, and that the owner of the adjoining ground might therefore lawfully erect a wall which prevented the admission of sufficient light for domestic purposes, if what was still admitted would have been enough for the making of malt. (e)

2. Pews.

2. *Pews.* The right to sit in a pew is treated by Blackstone as of a personal nature, that may descend by custom immemorial, without any ecclesiastical concurrence, from ancestor to heir; but it seems clearly to be at least an *incorporeal* interest in real property. (f) It is not an exclusive title to the pew itself, as a corporeal real estate, but is a right merely to sit or be there at particular times, for the specific purpose of attending divine service; for which reason trespass is not sustainable against a stranger for sitting therein, but case is the proper remedy; (g) though for actually breaking and injuring the wood-work of a pew, it has been said that trespass might be sustained by the owner against a mere wrong-doer. (h) And

(a) *Shadwell v. Hutchinson*, 2 B. & Adolp. 97; 9 Bar. & C. 591; 1 Mood. & M. 350.

(b) 2 Russ. R. 121, and *post*, chap. viii.

(c) 2 Vern. 646, *sed quare*.

(d) *Ante*, 151; 1 Campb. 322; 3 Campb. 81; 2 B. & Adolp. 164.

(e) 1 Campb. 322, 323.

(f) 3 Inst. 202; 12 Coke, 105; H.

Chit. Desc. 259. It appears to descend or pass by alienation of the house, not by any custom, but of common right; and see 2 B. & Adolp. 164, as to the subdivision of this right between several occupiers.

(g) 1 F. R. 430; 5 B. & Ald. 361, *per* Holroyd, J.; 8 B. & C. 294.

(h) 3 Bing. 137, 138, 2 Roll. R. 140; *Palm.* 46.

an action of trespass for breaking and entering a chapel and destroying the pews will lie at the suit of a perpetual curate of an augmented parochial chapelry, even against the chapel warden. (i) The right to sit in a particular pew in a church arises either from *prescription*, as appurtenant to a messuage, and which presumes a faculty, or from an actual faculty or grant from the ordinary, who has the disposition of all pews *de novo*, and which are not claimed by prescription. (k) In an action upon the case at law for a disturbance of the enjoyment of a pew in the body of the church, if the plaintiff claim it by prescription, he must state it in the declaration as *appurtenant* to a messuage in the parish. (l) But it is said that a pew in the aisle or chancel of the church may be prescribed for in respect of a *house out* of the parish. (m) This prescription may be supported by an enjoyment for thirty-six years, and perhaps any time above twenty years. (n) But where a pew was claimed as appurtenant to an ancient messuage, and it was proved that it had been so annexed for thirty years, but that it had no existence before that time, it was held that this modern commencement defeated the prescriptive claim. (o) In an action against the ordinary the plaintiff must allege and prove repairs of the pew. (p) But a possessory right to a pew is sufficient to sustain a *suit* in the Ecclesiastical Court against a mere disturber. (q) The faculty and a prescription, which supposes it, cannot be granted of a pew in the body of the church to a man and his heirs, but it must be in respect of a messuage within the parish. (r) The right to sit in a pew may be apportioned; and therefore where by a faculty reciting that A. had applied to have a pew appropriated to him in the parish church in respect of his dwelling-house, a pew was granted to him and his family for ever, and the *owners and occupiers* of the said dwelling-house; and the dwelling-house was afterwards divided into two; it was held

(i) 2 Young & J. 265.

(k) Gibbs' Cod. 221; see generally, as to the right to pews, 1 Phill. E. C. 316; see a declaration stating a faculty, 2 B. & Adolp. 164.

(l) 5 B. & Ald. 356; 8 B. & Cres. 294.

(m) Forrest. R. 14, 15; 5 B. & A. 361, S. P.

(n) 1 T. R. 428; 2 & 3 W. 4, c. 71.

(o) 5 T. R. 296; but now see 2 & 3 W. 4, c. 71.

(p) 1 Wils. 326; 8 B. & C. 280; 2 Man. & R. 318, S. C.; Loft's R. 423; Tidd, 9 ed. 444.

(q) 1 Phil. E. C. 316; see further, the cases and precedents, Forrest. R. 14; 1

Young & J. 583; 2 Chit. on Pleading, 817, note (a); Com. Dig. Action on Case for Disturbance, A. S.; 2 Saund. 175, c. d. Evidence; see 3 Campb. 288; 2 B. & Adolp. 164. The right is described "for plaintiff and his family, inhabiting a named messuage with the appurtenances, to have the use and benefit of a certain pew in the parish church of, &c. to hear and attend divine service celebrated therein, as to the said messuage and tenements belonging and appertaining;" or it may be claimed as "the right and privilege and liberty of sitting," &c.

(r) 1 T. R. 428; Forrest. R. 14; 5 B. & C. 1, ante, 155, note (k), supra, (k)(l).

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that the occupier of one of the two, though constituting a *very small part* of the original messuage, had *some* right to the pew, and in virtue thereof might maintain an action against a wrongdoer. (s) If a faculty for annexing a pew to a messuage has been obtained by surprise or undue contrivance, it may be revoked. (t) But a sentence in the Ecclesiastical Court or Court of Arches, relative to the right to a pew, is not conclusive evidence of the plaintiff's right in an action for disturbance, even between the same parties. (u)

3. Commons. (2) 3. *Commons*. The rights to use these are *incorporeal* hereditaments, being merely rights to take part of the produce or profits of another's land or water therein, such as to feed cattle, to dig turf, to cut wood, to catch fish, or the like, and are therefore principally of four sorts, viz. common of pasture, turbary, estovers, or piscary, being no right to the land itself, but merely to a part of the produce, to be taken in a certain manner. (y) These we have seen are distinguishable from beast-gates, cattle-gates, fold-courses, &c. which are exclusive corporeal rights to the pasture upon certain lands. (z) Being incorporeal interests not expressly named in the statute 43 Eliz. c. 2, these mere rights of common are not in general directly and *eo nomine* or separately rateable to the poor, though in effect they are so rated when attached to land, because the land to which they are appendant or appurtenant may be rated higher in respect of the annual value being increased by the circumstance of

(s) 2 B. & Adolp. 164.

(t) *Bull v. Jones*, 2 Haggl. Ecc. R. 417.

(u) 3 T. R. 639.

(x) As to appendants and appurtenances, *ante*, 153; as to rights of common in general, see *Com. Dig. tit. Common*; *Bac. Ab. Common*; *Selwyn, N. P. tit. Com.*; *Saund. Rep. Index, tit. Com.* The better cultivation, improvement, and regulation of common fields, wastes, and commons of pasture, is effected by 29 Geo. 2, c. 36, s. 1, 31 Geo. 2, c. 41, 13 Geo. 3, c. 81; and the 38 Geo. 3, c. 65, contains regulations for preventing the depasturing of forests, commons, and open fields, with sheep or lambs affected with the scab or mangle. The general inclosure act, 41 Geo. 3, c. 109, (amended by 1 & 2 Geo. 4, c. 23,) extends to all commons, which, however, is not to operate against the express provisions of any local act. See sect. 44; 1 B. & Ald. 630; 3 M. & S. 127.

In general, to sustain a common of pasture, a party should have *land*, and not merely a house without a curtilage, 5 T. R.;

46; but see 5 Taunt. 244. A copyholder must prescribe in the name of the lord of his manor for common on another manor, 5 Taunt. 365; *Saund. Rep. Index, Common*. Twenty years' adverse exclusion bars the right, 2 Taunt. 160; and on the other hand, twenty years' uninterrupted use in general gives the right, 2 & 3 W. 4, c. 71. As to the right to approve, 2 T. R. 391; 3 T. R. 445; 1 Stark. 102; *Rast. Entr.* 626, 627; *Thomps. Ent.* 453. Under the inclosure act, within what time to appeal against allotment decision, 3 M. & S. 127. What title to an allotment before award, 18 Ves. J. 207; 2 Bar. & Ald. 171.

(y) All sorts of common bear a resemblance to common of pasture; but in one respect they go further, common of pasture being a right only of feeding on the herbage of the soil; but common of turbary and others are a right of taking away the very soil itself, 2 Bla. C. 34, 35.

(z) *Ante*, 181, 182; *Roll. Ab.* 402; *Cro. Car.* 432; 7 T. R. 671; 1 T. R. 137; 2 T. R. 432; 2 Stra. 1084.

having the right of common attached to it. (a) But when the right of common is of an exclusive nature, as in the case of cattle-gates and beast-gates, so as to give the sole or exclusive right of pasture, it is otherwise: (b) and as there may exist such an exclusive right, it has been held that after verdict a declaration in ejectment for land, and also for "common of pasture" generally, without alleging that it was appendant to the land, is sufficient; (c) though in general ejectment for mere right of common of pasture separately is not sustainable: (d) and in general for disturbance of this right case is the proper remedy, and not trespass, unless where cattle have been driven or chased off the common. (e) In taking a conveyance or lease of land, to which a right of common is supposed to be attached, care should be observed to ascertain whether the right is legally appendant or appurtenant, or whether the prescriptive right may not have been extinguished by unity of seisin; and if there should be any doubt, then words of express grant should be introduced into the conveyance or lease, or words sufficient to pass a right to all commons *used* with the premises conveyed. (f) In pleading, and in evidence in general, twenty years' uninterrupted exercise of the right is at least *prima facie* sufficient, and sixty years' user is now conclusive. (g)

We have seen in a former page that common of pasture cannot be claimed in respect of a house alone without land; (h) but it may be in respect of land to which there is no house attached; and therefore where in an action for disturbance of plaintiff's right of common the declaration stated that he was possessed of a house and so many acres of land, with the appurtenances, and by reason thereof ought to have common of pasture, &c., it was held that this allegation was divisible, and that proof that the plaintiff was possessed of land only, and entitled to the right of common in respect of it, was sufficient to entitle him to damages *pro tanto*. (i)

Common of *pasture* is *appendant*, *appurtenant*, or *in gross*. The fourth, *pur cause de vicinage*, is not a right of common, but merely an excuse for a trespass when two commons be near

(a) 9 B. & Cres. 827; Burn's J. Poor, 83, &c.

(b) 5 East, 480; 1 B. & Cres. 389; 2 D. & Ry. 651; 4 B. & C. 750; 6 D. & R. 635; Burn's J. Poor, 83 to 88.

(c) Cas. T. Hard. 127; 1 Stra. 54; Adams's Eject. 5 ed. 19.

(d) Id. ib.

(e) 2 East, 154; 3 Wils. 279.

(f) 1 Taunt. 205; *Cowlam v. Slark*, 15 East, 108; Wils. 310, 319; *ante*, 156, 157.

(g) 2 & 3 W. 4, c. 71; see further as to rights of common, Com. Dig. tit. Common; Bac. Ab. Common; 2 Bla. C. by Chitty, 32 to 35, in notes.

(h) *Ante*, 155; but see 5 Taunt. 244.

(i) 2 B. & Ald. 360.

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to each other, and the cattle of the commoners have been accustomed to wander on each, in consequence of there being no division fence between. It would not justify one commoner turning or driving his cattle on to the common upon which he has no strict right of pasture, and the owner of the soil might legally fence one common from the other, and thereby put an end to this mere excuse for the trespass. (*k*)

Common *appendant*, properly, is a right attached to *arable* land, and is an *incident* of tenure, and supposed to have originated in the lord or owner of a manor or waste originally, in consideration of certain rents or services, or other value, granting out to a freeholder or to copyholders plough land or land to plough, and at the same time granting either expressly, but generally *impliedly* and as of *common right* and necessity, common appendant over his remaining wastes and commons, *so that such grantee might, whilst his corn was growing, have a place to turn out and feed his horses and beasts kept to plough such land, and sheep and other cattle kept to manure the same.* (*l*) Levancy and couchancy are as incident to common appendant as well as to common appurtenant; that is to say, the occupier of the arable land can turn on no more cattle than would be proper to till and manure his quantity of arable land, nor more than the produce of the land would support in the winter, and consequently the *number* as well as *kind* of cattle must be limited, with relation to the quantity and nature of his land; (*m*) and it cannot be for cattle *borrowed*, unless they be used all the year to plough or manure his land, (*n*) and for that reason this right of common is *apportionable* or *severable*, and if the land be divided ever so often, every little parcel of land is entitled to common appendant, and it may be claimed even for a yard of land, because the aggregate number of cattle that may be legally turned on would not, by such subdivision, be increased. (*o*)

Common *appurtenant* differs from appendant in respect of its origin, not being necessarily connected with tenure, nor confined to arable land, nor to beast of the plough, or for manuring land, but may extend to animals not generally commonable, as hogs, goats, or the like. These originated in a grant by deed,

(*k*) *Musgrave v. Cave*, Willes, 319, 322; Co. Lit. 122; 13 East, 348; 2 Wils. 269; 2 Woodes. 78; 4 Co. 38; 2 Mod. 105.

(*l*) Co. Lit. 122, a, *per* Willes, C. J. in *Bennett v. Reve*, Willes, 222, 322; 2 Bla. C. 32. The reason is not that the tenants by their tenure were obliged to plough the lord's lands, *per* Willes, C. J. Willes, 230.

(*m*) 4 Vin. Ab. 583, pl. 6; and *per* Willes, C. J. Willes, 222, 322; 2 Bla.; as to the necessity for land or a curtilage, 5 T. R. 46; but see 5 Taunt. 244.

(*n*) *Id. ibid.*; Wood's Institutes, 208, 209.

(*o*) 4 Coke, 37; 8 Coke, 79, a; Willes, 222, 322; *per* Taunton, J. in 2 B. & Adolph. 168.

which might be made by any person who had waste or other land to another person, owner of other land, to have his cattle, or a particular description of cattle, *levant and couchant* upon his land, upon such waste or other land, at certain seasons of the year, or at all times of the year; and uninterrupted usage for upwards of twenty years, during a tenancy in fee of the owner of the waste, will afford sufficient evidence of a corresponding right. Such an express grant may be made at this day. (p) The intendment is, that no person would make such a grant without limit as to the number of cattle, and that he would grant it only for such number as would be essential or useful for the fair occupation of the grantee's land, and consequently only for so many of his *own* cattle as the produce of that land in the summer and autumn can keep and maintain in the winter, which is the meaning of the term *levant and couchant*. Until the quantity of cattle has been fixed by a jury, the precise number is uncertain, as more produce may be raised in one year than in another, and which is the reason this is sometimes, though inaccurately, termed common *sans nombre*, but still it is certain in its nature, and to be readily ascertained, with reference to the quantity and quality of the land, and the usual produce and number of cattle ordinarily kept upon the same during the last twenty years. (q) In a plea, therefore, prescribing for common of pasture appurtenant to land, it is essential to aver that the cattle were the party's own cattle *levant and couchant* on his land; (r) and if the claim be for an unlimited number, without these qualifying words, it cannot be supported; (s) and the notion that common *without stint* can exist is exploded. (t) Common appurtenant may be apportioned the same as common appendant. (u)

Common in *gross* is a right to turn on for pasture a certain limited number of cattle, and which may have been made, and still may be, by grant under seal, without regard to tenure or to any land of the grantee, and is merely to the grantee and his heirs at large, without qualification, and belongs to his person, and is therefore termed in *gross*. It may be claimed by prescriptive right, which supposes an original grant by deed, as by a parson of a church, or a sole corporation. It is a separate inheritance, entirely distinct from any landed property, and may be vested in one who has not a foot of ground in the manor, (x)

(p) 15 East, 116.

(q) 2 Brownl. 101; 1 Vent. 54; 5 T. R. 48; 1 B. & Ald. 706; Rogers v. Benstead, Selwy. N. P. tit. Common.

(r) 1 Saund. 28, 343; 2 Saund. 346, n. 1; 8 T. R. 396.

(s) Willes, 232; 8 T. R. 596.

(t) Id. ibid. overruling what is said in 2 Bla. C. 34.

(u) Antc, 212, note (v); 2 B. & Adolp. 168.

(x) 2 Bla. C. 34.

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and it is never parcel of a manor. (y) It follows that levancy and couchancy is not essential in the exercise of this right. (z) Under the old settlement acts, 13 & 14 Car. 2, a right of common in gross, as the going of two head of cattle on a common, was holden to give a settlement. (a) A fold-course for not exceeding 300 sheep may be granted even by the owner to another. (b)

Common appendant and appurtenant are frequently confounded in the books, (c) nor is it necessary in *pleading* to allege in express terms whether the common of pasture be appendant, appurtenant, or in gross, for the court will judge of it from the nature of the right as otherwise claimed, though the word *pertinent* is always used in claiming common in respect of the occupation of any land. (d)

We may here observe, as a general rule, that twenty years' uninterrupted use of a common for a certain description of cattle, or in any particular way, will establish a right, if by law a grant could have legally been made to the extent of the usage.

4. Ways. (e)

4. *Private ways.* With respect to these they must have originally been created by grant under seal; but in the absence of an express grant they may be established by prescription after twenty years' uninterrupted enjoyment. Such long enjoyment of a way is now of itself, in general, a sufficient *prima facie* title, and *forty* years is conclusive, unless it be shown that it was enjoyed by some consent or agreement expressly made for that purpose by deed or writing, and the right may be claimed merely by averring and proving such long possession in the cases mentioned in the recent act. (f) Here also a purchaser or lessee should ascertain the title to the way, and if it be doubtful whether the prescriptive right may not have been destroyed by unity of seisin or other means, he should require a fresh express grant, or at least words sufficient to pass all ways theretofore *used* by the prior occupiers. (g) The word "*belonging to*" is only synonymous to "appurtenant," and not equivalent to the word "*used*," and will not pass a way extinguished by unity of seisin, unless it be a way of *necessity*. (h) Injuries to a right of way may in general be remedied by abatement or removal of the obstruction, (i) or by action on the case, but not by action

(y) Willes, 323; 4 Co. 38, a.
(z) 5 Taunt. 244; 1 Rol. Ab. 401, pl. 3; Cro. Jac. 27; 1 Ld. Raym. 726.
(a) 7 T. R. 671.

(b) 1 Rol. Ab. 402; Cro. Car. 432; Sir W. Jones, 375.
(c) Per Willes, C. J. in Willes' Rep. 222 and 319.

(d) Per Willes, C. J., Willes' R. 319.

(e) See in general the full notes of modern decisions, 2 Bla. Com. 35, 36.

(f) 2 & 3 W. 4, c. 71.

(g) 3 Taunt. 24; 5 B. & Ald. 830; 2 B. & Cres. 100; 2 Dowl. & Ry. 287, S. C.; 15 East, 108; ante, 156, 157.

(h) Decided in K.B. Hil. T. 1833.

(i) 2 Smith, 9.

of ejectment or by trespass, unless in case of assault upon the person attempting to use his right of way.

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5. *Watercourse.* The right to the use of water, without any property in the subjacent land, is, we have seen, a mere incorporeal hereditament, which must be created by express grant under seal, or be founded on prescription, which supposes an ancient grant, or now, by the recent important act, the right may be directly claimed and proved by mere uninterrupted user for twenty or forty years. (k) There is also a peculiarity relating to a claim of this nature, viz. that it never was destroyed by unity of seisin of the land and water, and of the place in respect of which the use to the water was claimed, the law admitting an exception to the general rule on account of the uncontrollable nature of water, which will run in its old course, in spite of legal fictions or rules, and that the claim to water is not strictly by grant or prescription, but *ex jure nature*; (l) so that in the case of a watercourse a purchaser or lessee need not, as he should in the case of commons or of ways, be solicitous with respect to the title to a natural watercourse, which will come to and run from his purchased or leased land precisely the same, without regard to the terms of his conveyance. To this rule, however, there may be many exceptions, especially where there be many persons claiming or likely to claim water from, or the use of water in the same watercourse, in which stipulations securing the right of the purchaser or lessee should be cautiously introduced. In general, the remedies for obstructions or injuries to a watercourse are abatement of the nuisance, (m) or an action on the case. (n)

5. Water-
courses. (i)

6. *Advowson* or *patronage* is the right of presentation to a church or ecclesiastical benefice. Advowsons are either *appendant* or in *gross*, and are either presentative, collative, or donative. (p) If *appendant* to a manor it will pass or be conveyed together with the manor, as an incident and appendant, by a conveyance of the manor only, without adding any other words. (q) But where the property of the advowson has been once separated from the property of the manor by a legal con-

6. Advow-
sons. (o)

(j) See in general, *ante*, 189 to 193; and 2 Chit. Pl. 5 ed. 788 to 799; and 2 Bla. Com. 14, 90, 403, n. (7); 3 Id. 218.

(k) 2 & 3 W. 4, c. 71, s. 2, &c.

(l) 1 Bos. & Pul. 374; see Vin. Ab. Extinguishment, C.; Poph. 166; Latch, 153; 3 Bulstr. 340.

(m) 2 Smith's R. 9.

(n) See several precedents and notes, 2 Chit. Pl. 5 ed. 788 to 799.

(o) *Ante*, 150, 163, 164.

(p) 2 Bla. C. 22.

(q) Co. Lit. 307.

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veyance, it is called an advowson in *gross* or at large, and never can be appendant again, but is for the future annexed to the *person* of its owner, and not to his manor or lands; (*r*) and an advowson in gross cannot be extended under an elegit. (*s*) The right of presentation is the right to offer a clerk to the bishop to be instituted to a church. (*t*) All persons seised in fee, in tail, or for life, or possessed for a term of years of a manor to which an advowson is appendant, or of an advowson in gross, may present to a church when vacant. Although this is a right considered of great value as a provision for relations, a pledge of friendship, or, what is its true use and object, the reward of learning and virtue, yet the continued possession of it, and the actual presentment of the clerk never yield any *lucrative* benefit to the owner, as the law has provided that the exercise of this right must be perfectly gratuitous. The advowson itself is valuable and saleable, but not the presentation when the living is void; (*u*) therefore the mortgagor shall nominate when the church is vacant, though the advowson has been mortgaged in fee, and though the legal right to present is transferred to the mortgagee, yet as he can derive no advantage from the presentation (which must be gratuitous) in reduction of his debt, (*x*) for which he could account, a court of equity will compel the mortgagee to present the nominee of the mortgagor. (*y*) So though the assignees of a bankrupt may sell the advowson, yet if the church be void at the time of the sale, the *bankrupt* himself must present the clerk; (*z*) and if an advowson is sold when the church is void, the grantee cannot have the benefit of the next presentation, and it has been doubted whether the whole grant is not void, (*a*) though probably there would be no objection to the grant of an advowson though the church is vacant, if the next presentation be expressly reserved by the *grantor*; especially as it has been decided that a conveyance of an advowson, though void for the next presentation, yet may be good for the remaining interest when it can be fairly separated from the objectionable part. (*b*) And it has been recently held in the House of Lords that the sale of a next presentation, the incumbent being *in extremis*, within the know-

(*r*) Gilb. Exec. 120.

(*s*) Gilb. Exec. 39; it then passes in a will under the word "tenements," 4 Bing. 293; but not under the word "lands," ante, 151, 153.

(*t*) Ante, 150; Co. Lit. 120, a; 3 Cruise, 3.

(*u*) 1 Leon, 205; ante, 150.

(*x*) 3 Atk. 599; Mirehouse, Adv. 100.

(*y*) 2 Vern. 401; Com. R. 343; 3 Atk. 559; Owen, 49.

(*z*) Mirehouse, 156.

(*a*) Cro. Eliz. 811; 3 Burr. 1510; Bla. Rep. 492, 1054; 2 Wils. 174; Amb. 268.

(*b*) 5 Taunt. 727; 1 Marsh. 292.

ledge of both contracting parties, but without the privity or with a view to the nomination of the particular clerk, is not void on the ground of simony. (c) An advowson is a fee in gross is assets in the hands of the heir, for he might sell such advowson. (d) But it is not extendable under an *elegit*, because a moiety cannot be set out, nor can it be valued at any certain rent towards payment of the debt. (e) He who has an advowson or right of patronage in fee may by *deed transfer* every species of interest out of it, (*viz.*) in fee, in tail, for life, for years, or may grant one or more presentations. The right of presentation *descends* by course of inheritance from heir to heir as lands and tenements, unless the church become vacant in the *lifetime* of the person seised of the advowson in fee, in which case the void term being then a chattel goes to the executor, unless it be a donative benefice, and in that case the right of donation descends to the heir. (f) If, however, the patron present and die before his clerk is admitted and his executor presents another, both these presentments are good and the bishop may receive which of the clerks he pleases. (g) Where the same person is patron and incumbent, and dies, his heir is to present; (h) but such patron and incumbent may *devise* the presentation. (i) But as we have seen, an advowson in gross will not pass by the word "*lands*" in a will, though it will be comprehended under the terms *tenements* and *hereditaments*. (k) But where a testator gave to his son, who was then the incumbent, the perpetual advowson of H. and all his lands, it was held that the son took only a life estate. (l)

The *remedy* for the infraction of the incorporeal right of presentation is an action *quare impedit*, in which, although no profit can be taken for presenting the clerk, yet the patron, whose right of patronage is injuriously disturbed, recovers two years' value of the church, if the turn of presentation be lost. (m)

(c) *Fox v. Bishop of Chester*, 6 Bing. 1.

(d) 3 Bro. P. C. 556; 1 Bro. P. C. 144.

(e) Gilb. Excc. 39; 2 Saund. 63, f.

(f) 2 Wils. J 50; 8 Bing. 490.

(g) Co. Lit. 388, a; Burn's Ec. L. tit. Advowson; Mirchouse on Advowsons, 139, where see in general the right of presentation; see further as to presentation by joint tenants and tenants in common, 2 Saund. 116, b.; in case of parceners the eldest sister is to present first, Willes, 659; 2 Bla. C. 190, n. 16.

(h) 3 Lev. 47; 3 Buls. 47; 8 Bing. 490; an advowson belongs to a prebendary in right of his prebend. The church becomes

vacant, and prebendary dies without having presented, the prebendary belongs to his *personal representative*, according to the opinion of six judges out of eight, delivered in the House of Lords, 8 Bing. 490, where see the nature of an advowson fully discussed; and see 7 B. & Cres. 113, S. C.

(i) 1 Lev. 205; 2 Roll's R. 214, 216; Cruise's Dig. 21; Mire, 73.

(k) *Ante*, 151, 153; 4 Bing. 293.

(l) (Park, J. dissent.) 3 Brod. & B. 27; *ante*, 159.

(m) 3 Cruise, 17, 18. *Quare impedit* lies also jointly for a church and hospital, Willes, 608.

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Whereas if a parson be evicted from or disturbed in his rectory, which is corporeal property, his remedy is by action of ejectment or trespass. *(n)* Where the bishop refuses without good cause or unduly delays to admit and institute a clerk, he may have his remedy against the bishop in the *Ecclesiastical Court*. *(o)*

6. Tithes.

6. *Tithes* are incorporeal hereditaments, because the owner has no distinct tangible right to any part even of the produce of the real and corporeal property whilst growing, or even after severed, until the tithe has been set out, but merely a right to have the tithe duly set out from the residue of the produce. At common law, therefore, any injury to the right to tithe could not be remedied by any action appropriated only for injuries to corporeal real property. But the remedy by ejectment for tithes, and real actions, and for other ecclesiastical or spiritual profit, was given by 32 II. 8, c. 7, s. 7, without claiming the same as a rectory or chapel, and the tithes thereunto appertaining, but generally for certain tithes of corn, grain, wood, grass, wool, lambs, and calves, arising, growing, renewing, increasing, and happening within the parish of, &c., and within the bounds, limits, and titheable places thereof; *(p)* though it is said, that the particular species of tithe, though not the precise quantity of each, must be stated. *(q)* The remedy by ejectment is, however proper, against a third person only, who illegally claims a right to the tithe, and not against the occupier, against whom, if he illegally neglect to set out either great or small predial tithe in kind, (excepting agistment tithe, which cannot be set out,) the proper remedy is an action of debt for the treble value, founded upon 2 & 3 Ed. 6, c. 13, *(r)* or by suit in equity, or in the Ecclesiastical Court, for subtraction of tithe, which, when the contest is with many parishioners, may be preferable to a common law suit, *(s)* especially as costs are recoverable in such a suit, unless there has been a previous adequate tender, whereas no costs are recoverable in an action for not setting out tithe in kind, when the single value exceeded 6*l.* 13*s.* 4*d.* *(t)* The Ecclesiastical Courts have no jurisdiction to

(n) *Ante*, 163, 164.

(o) 3 Cruise, 17. As to any remedy for the clerk at law, see 13 East, 419; 15 East, 117.

(p) Cro. Car. 301.

(q) 11 Co. 25. b; 1 Rol. R. 65, 58; Dyer, 84, 116, b.

(r) 1 Brownl. 65; Moore, 915; 3 Anstr. 763.

(s) 3 Bla. C. 87, 88; Com. Dig. Prohibition, G. 5; Bac. Ab. Courts Ecclesiastical, D. and title Tithe, E. e; Mirehouse on Tithes, 203 to 208; Burn's J. tit. Tithes, where see the law and proceedings in an Ecclesiastical Court.

(t) 2 Mad. Ch. Pr. 556, 557; 1 Hen. Bl. 107, 108; *ante*, 27, note *(f)*.

try the *right* of tithes, unless between spiritual persons, but only between spiritual men and laymen, to compel the latter to pay them when the right is not disputed, (u) and if ~~in~~ a suit in the Ecclesiastical Court for subtraction of tithe the defendant plead any custom, modus, composition, or other matter, whereby the right of tithing, or the obligation to set out the tithe, is called in question, that must be tried by a jury, and the Spiritual Court has no jurisdiction to proceed, and may be restrained by prohibition. (x)

If the tithes withheld are not predial, or could not be set out in kind, then there is no remedy at law, but the proceeding must be by bill in Chancery, or perhaps more properly in the Court of Exchequer, (y) or libel in the Ecclesiastical Court, and which being proceedings relating to a permanent right, are sustainable, however small the present value of the tithes withheld may have been. (z) When the title to the tithes claimed is clearly made out, the Court of Chancery or Exchequer will decree an account; but if the title of the claimant to tithe at all is disputed, the suit then becomes in effect an ejectment bill, and the title must be tried at law: and where a modus or real composition is pleaded, and supported by affidavits of reasonable evidence, to show that the question is fairly disputable, then the practice is to direct an issue at law before the court proceeds to decree against the common law right of the parson. (a)

The recent act, 2 & 3 W. 4, c. 100, renders evidence, that land has been exempt from tithe for *thirty years*, or that a *modus decimandi* has been paid during that time, presumptive evidence of right; and *sixty years'* exemption from payment are in general conclusive, where there has been an agreed composition between the owner of the tithe and the occupier of the land to pay a fixed sum, in lieu of rendering tithe in kind. The agreement is, in most respects, analagous to a tenancy from year to year of land, and the composition is to be determined by a similar notice to quit, unless it were for a time certain, as for one year. (b) Where an occupier, who had been under composition for tithes, refused for two years to set out the tithe in kind, alleging that he was exempted by a modus, it was held, in an action on the 2 & 3 Edw. 6, for the treble value

(u) 2 Rol. Ab. 309; 2 Inst. 364, 489;
3 Bla. C. 88, 89.

(x) 2 Rol. Ab. 309; 2 Inst. 364, 489;
3 Bla. C. 88, 89.

(y) Mad. Ch. Prac. 104 to 109.

(z) 4 Bro. P.C. 314; 1 Mad. Ch. P. 105.

(a) 1 Mad. Ch. Pr. 105 to 108.

(b) 1 Bos. & P. 458; 6 Taunt. 333;
2 Marsh. 38; 1 Brod. & B. 4; 3 J. B.
Moore, 216.

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of the tithes, that it was not necessary to prove any notice to determine the composition, the occupier's disclaimer of the rector's title to tithe in kind rendering notice unnecessary, as it would where there has been a tenancy of land. (b)

But these compositions are entirely personal between the rector and the occupier for the time being, who were parties to the bargain, and if the former die his successor is not bound, though if he be content to continue to receive the like composition, there will be a just apportionment between him and the executor of the deceased incumbent. (c) So if the tenant cease to occupy, the fresh occupier will immediately become liable to set out tithe in kind. (d)

The owner of tithe, before he enters into a composition, should be certain of the solvency of the occupier with whom he is to contract, for, by entering into such a composition, the common law right and remedy regarding the tithe itself, and also the remedy on the statute, is waived, and the tithe-owner could only have his personal action for the arrear of the composition; so that, if the occupier become insolvent, he may lose the benefit of his former right. (e)

When the owner of tithes lets them by *parol*, he continues liable to be rated to the poor in respect thereof, because, tithes being an incorporeal hereditament, they cannot be conveyed or passed without deed, (f) though it is otherwise when he has let them by *deed*, a circumstance which should be taken into consideration, as well by the owner as the lessee of tithe, before entering into the contract. (g) In general, a parson who lets to each parishioner the tithe growing on his own land is properly, in legal contemplation, still the occupier of the tithes, and ought to be rated accordingly, and not the occupier of the land. (h) The rector is, in some instances, exonerated from the burthen of poor-rate on his tithes by the arrangement for an extinguishment of tithe in an inclosure act; as where such an act provided that a certain corn rent, free from all taxes and deductions, (except land-tax,) should be issuing out of the lands to be inclosed, and to be paid to the rector in lieu of tithes, it was held that such corn-rent was not liable to be assessed to the relief of the poor; (i) but the mere extinguishment of the tithe and the sub-

(b) 1 Brod. & B. 4.

(c) 10 East, 269; 8 Ves. 308; 2 Ves. & B. 334.

(d) 2 Chitty R. 405.

(e) 4 Madd. R. 177.

(f) *Rex v. Lambeth*, 1 Stra. 525; 9 B. & Cres. 479, and 4 Man. & Ryl. 334, S. C.; 16 Vin. Ab. 427.

(g) *Rex v. Lambeth*, 1 Stra. 525; 1 Eagle on Tithes, 19; Burn's J., Poor, 68, 69.

(h) 16 Vin. Ab. 427; *Chanter v. Glubb*, 4 Man. & Ryl. 334; 9 Bar. & Cres. 479, S. C.; Burn's J., Poor, 68.

(i) 6 Bar. & Cres. 271; 3 Bar. & Cres. 863.

stitution of an annual rent or consideration will not discharge the rector's liability; (*k*) and if a person be entitled to the tithe of all fish caught in the parish, or to oblations and other offerings which constitute the rectorial or vicarial dues, he is rateable in respect thereof. (*l*) A summary mode of enforcing payment of tithes, oblations, and compositions, not exceeding 10*l.*, is given by statutes by complaint to two justices of the peace, (*m*) and against Quakers to the extent of 50*l.*

Tithes in the hands of lay impropiators may be held in fee-simple, fee-tail, for life, or years, and these are assets for the payment of debts, and are governed by the same rules of descent as temporal inheritances, and have all other similar incidents belonging to them; they are alienable in the same manner as other real estate, and are included in the statute of uses, under the word "hereditaments." (*n*)

8, and 9. With respect to *offices* and *dignities*, (two other incorporeal hereditaments,) as they are not of great general importance, nor are they daily subjects of legal discussion, we shall merely mention them, referring to the works in which they have been particularly discussed. (*o*) We must, however, observe, that the offices here referred to are those in which a person may have an estate to him and his heirs, or for life, and legal fees attached to them, and in respect of which, if a disturber receive such fees, and not merely gratuities, the owner might support an action to recover the fees as received to his use, without resorting to the ancient writ of assize of office. (*p*) Ministerial offices may be in reversion, but in general not when they are judicial.

8. Offices.
9. Dignities.

10. *Franchises* and *liberties* are very various, and almost infinite, but always denote a *royal* privilege subsisting in the hands of a subject, and which originated in an express grant from the crown, or may now be presumed after length of time, and therefore may be prescribed for. They are principally to hold courts, (*q*) to have a manor, to have waifs, wrecks, estrays, treasure trove, royal fish, forfeitures, and deodands; to have an

10. Franchises.

(*k*) 4 B. & Cres. 467; 6 Dowl. & R. 467, S. C.

(*l*) 3 T. R. 385.

(*m*) 7 & 8 W. 3, c. 6 and 34; and 53 Geo. 3, c. 127; 1 Geo. 4, st. 2, c. 6; 7 Geo. 4, c. 15; Burn's J., Tithes.

(*n*) H. Chit. Descent. 200; but see *ante*, 206, note (*n*).

(*o*) See 2 Bla. C. 36 to 44; Cruise's Digest, tit. Offices; 1 Tho. Co. Lit. 208,

236, &c.; Com. Dig. Offices. As to acquiring a settlement by an office, see Burn's J., Poor, Index, tit. Office; and see Harrison's Index, tit. Office; and Chit. Col. Statutes, tit. Office, as to the sale of an office; and see 1 B. & Adolp. 761.

(*p*) See in general 1 Tho. Co. Lit. 236, 237, and notes.

(*q*) 9 East's R. 335, 340.

CHAP. IV.
I. RIGHTS
TO REAL
PROPERTY.

exclusive bailiwick ; or liberty to have a *fair*, (r) or market, or right of taking tolls ; or to have a forest, chase, park, free-warren, or fishery endowed with a privilege of royalty. (s) We will consider the latter as well respecting the civil rights as criminal injuries and remedies.

Forest, Chase,
Purlieu, and
Deer. (t)

Forests,

Chases.

Franchises relating to *game* are forests, purlieus, chases, parks, and free-warren, the civil rights and criminal provisions respecting which we will here shortly notice. *Forestal* rights, properly so called, are not grantable to a subject. (u) It is said that there are only thirteen legal chases in England. (x) A *chase* is an open tract of country privileged for game, and usually less than a forest, and ought not to be inclosed. It does not necessarily give the owner any interest in the land, but merely in the beasts and game therein, and the exclusive right to pursue the same ; it may be, and usually is, claimed over other persons' grounds, though it may, like free-warrens, be over the owner's land, without merging in the higher territorial property. (y)

Parks. (z)

A legal *park*, properly so called, is a large tract of inclosed ground privileged for wild beasts of chase, and must be founded on the king's express grant, or claimed by prescription, and it is not strictly legal to erect a park *de novo* without such grant. (a) It is said there are only 781 legal parks in England, (b) though no information or criminal proceeding could be instituted for so doing. (c) When legally made, it has some peculiar privileges and properties, namely, the owner or keeper of a *lawful* park may legally shoot a self-hunting dog in pursuit of the deer, which no owner of other land, or of an illegal park, could do, (d) and deer in a lawful park go to the heir, and not to the executor, (e) unless where the deceased owner was merely a lessee for years. (f)

Criminal of-
fences relating
thereto.

As respects *criminal* injuries, and the protection afforded to *these places*, it will be observed, that *parks* are not expressly mentioned, and the only distinction between the several

(r) Trespass lies against a person for disturbing plaintiff in the profits of a *fair*, by erecting a toll booth, without saying *quare clausum fregit*, *Smith v. Pearson*, Woodfall, L. & T. 542.

(s) 2 Bla. C. 37, 38 ; Cruise's Dig. Index, Franchise ; Com. Dig. Franchise.

(t) Manw. 143 ; and see in general Chitty, Game Law ; Burn's J., Game.

(u) 5 Price, 269 ; see Manw. on Forests in general.

(x) 1 Wood. Vin. Lee, 129.

(y) Manw. 49 to 147 ; see further as to

Chase, 3 Tho. Co. Lit. Index, Chase.

(z) There are very few (about 781) legal parks strictly entitled to privileges.

(a) 1 Wood. Vin. L. 129.

(b) Bro. Ab. tit. Action sur le Statute, pl. 48 ; Co. Lit. 223 ; 2 Inst. 199 ; 11 Coke's R. 86.

(c) 2 Id. Raym. 1409 ; 1 Stra. 637.

(d) 1 Saund. 84, note (3) ; Cro. Jac. 45 ; 11 East, 568.

(e) 1 Inst. 8 ; Toller, 192, *ante*.

(f) Toller, 148.

places is, whether the same be or not *inclosed*. Thus the unlawfully and wilfully coursing, hunting, snaring, or carrying away, or killing or wounding, any deer kept or being in the *inclosed* part of a *forest*, *chase*, or *purlieu*, or in any *inclosed land*, wherein deer shall be kept, is felony, punishable as simple larceny; (*h*) and if in the *uninclosed* part of any forest, chase, or purlieu, the offence is punishable before a justice with 50*l.* penalty, and a second offence is felony; (*h*) and if venison, upon a search warrant, be found in possession of a person without his accounting for his lawful possession, he forfeits 20*l.*; (*i*) and the setting any snare, or breaking down a fence, is a 20*l.* penalty; (*k*) and persons unlawfully entering such places, with intent to take deer, may with their guns and dogs be seized by the keepers and their assistants for the use of the owner; (*l*) and the beating or wounding any deer-keeper is felony. (*l*)

Free-warren is a franchise, founded on express grant from the king, or a prescription which supposes it. It is an exclusive privilege to preserve and kill certain beasts and fowls of warren (such as hares, rabbits, roes, partridges, pheasants, rails, and quails, woodcocks, and mallards, and herons, but not grouse,) (*n*) in a certain tract originally of open country, even in exclusion of the owners of the soil, and being such an exclusive right, the owner of the free-warren may support trespass against any person, even the owner of the land, who pursues game of warren within the district, although no such game be killed, and may recover full costs, although the damages be under forty shillings, (*o*) because it is impossible that the title to the soil can ever come in question, for though both may unite in one person, yet the title to the free-warren is always collateral to that of the land, and a man may have and frequently does claim a free-warren in *alieno solo*, and unity of seisin of the land and free-warren does not extinguish the latter. (*p*) It is a right that may at this day be granted by the king to a person over his own land, though such a modern grant is not usual. (*q*) The owner of a free-warren may legally kill self-hunting dogs that

(*h*) 7 & 8 Geo. 4, c. 29, s. 26, &c.

(*i*) *Id.* s. 27.

(*k*) *Id.* s. 28.

(*l*) *Id.* s. 29.

(*m*) There are very few legal free-warrens in the kingdom, though very frequently conveyances profess to pass the right; see in general, 2 Bla. C. 38; Com. D. Chase, F.; Co. Lit. 233; 1 Chitty, Game L. 19 to 23.

(*n*) Grouse are not birds of warren, Manw. 44; Co. Lit. 253; 7 B. & Cres. 36.

(*o*) 2 Salk. 637; 2 Bla. R. 1150;

5 Taunt. 422; 2 M. & S. 499; 7 B. & C. 36.

(*p*) 3 Dyer, 326; Chitty, G. L. 23; in 1 Campb. 313, Heath, J., appears to have supposed that a right of free warren is not apportionable, *sed quare*, for the owner of a free-warren may grant a part of his exclusive right to another, and which may be prescribed for. See *Davie's case*, 3 Mod. 246; and other cases, Chitty on Game Laws, 2d ed., 20, 21, note (*d*).

(*q*) Cruise's Dig. 34, s. 4.

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haunt the warren. (r) The game killed by any person in a free-warren instantly become the property of the owner. (s) The rabbits and game go to the heir, and not to the executor of the owner, unless he were a mere lessee. (t) Twenty years' undisturbed exercise of a free-warren may, as in case of other incorporeal right, afford presumptive evidence of a lawful and perfect right of free-warren. (u) But even when an express grant of free-warren can be proved, yet if the freeholders and others within the tract of country over which the free-warren is claimed have repeatedly, without interruption, or without being sued with effect by the owner of the free-warren for so doing, killed game, though on their own lands, a release or some extinguishment of the free-warren may be presumed. So that the owner of a strict legal free-warren must, in order to continue his right, watchfully prosecute every material invasion of it. And claims of free-warren, though frequently recited and conveyed in title deeds, can but rarely be supported in evidence.

Franchises of
free fishery, se-
veral fishery,
and common of
fishery.

The rights of free fishery, several fishery, and common of fishery, have also been considered as franchises. 1. *Free fishery* is an exclusive right of fishery in a *public navigable river*, or sometimes in an arm of the sea, originating in a grant from the king. (x) 2. *A several fishery* is an exclusive right to fish usually in a *private* river or water, not navigable, and may be confined to the right to fish there, or may also include the ownership of the soil, and ejectment may in some cases be supported for a several fishery, (y) whereas the owner of a free fishery never has any interest in the soil. (z) A several fishery in a navigable river is an incorporeal and not a territorial hereditament, and a term for years in it cannot be created without deed; (a) but such a several fishery in a navigable river or arm of the sea may pass as appurtenant to a manor, (b) and such a right of fishery may be *apportioned* and lost as to a part, but reserved as to the residue. (c) 3. *Common of fishery* does not import any exclusive right, nor any property in the fish before

(r) Cro. J. 45; 1 Saund. 34; 11 East, 568.

(s) 2 Bla. R. 1151.

(t) 1 Inst. 8.

(u) 6 East, 215; 7 East, 199; 11 East, 488; 2 Saund. 175, n. 2; 2 B. & Ald. 667; 4 B. & Cres. 639; 7 D. & R. 49, S. C.; 2 & 3 W. 4, c. 71.

(x) Com. Dig. Piscary; 2 Bla. C. 39, 40; Co. Lit. 127 & 122, in notes; see 2 Chit. Pl. 875, note (d); 4 T. R. 437; 2 Hen. B. 182; must have been by deed, 5 B. & Cres. 875; ante, 191, as to

fisheries.

(y) Id. ibid.; 5 Burr. 281; the owner of a several fishery in a river not navigable is *prima facie* owner of the soil, 2 Chit. R. 658; 5 B. & Cres. 875.

(z) 1 T. R. 361; 2 Salk. 630; Co. Lit. 4; 1 Chit. R. 201; 1 M. & S. 652, as to whether the grant of a fishery passes the soil; a right to *sea fish* does not entitle the party to shell fish, 2 M. & S. 568.

(a) 5 B. & Cres. 875.

(b) 1 Campb. 312.

(c) Per Heath, J. in 1 Campb. 113.

taken, but merely a right to take fish in the same water which others also have a right to fish in, and therefore, as the party has no exclusive right, he cannot support trespass against a stranger for fishing in the fishery any more than a party entitled to common of pasture could support trespass against a stranger for turning on cattle and diminishing his pasturage, and his proper remedy is an action on the case. *(d)* The right to fish in the sea or in an arm of the sea is of common right in all subjects, and therefore a plea claiming such a right of common of fishing by prescription would be bad, *(e)* and a right to fish in the sea or a navigable river is always subject to the right of navigation, and must be so conducted as not to impede it. *(f)*

11. 12. *Corodies*, and also annuities, are named as specimens of incorporeal hereditaments, *(g)* but as neither of them issue out of nor are connected with land, *(h)* though the former were charges in the ecclesiastical person of the owner in respect of his inheritance, and the latter being purely personal and wholly unconnected with real property, though the regular payment may be secured by a charge thereon, they might more properly be classed amongst personalties. When the latter are wholly personal, and not charged upon real property at all, or stock, or not charged upon land of equal or greater annual value than the annuity, and whereof the grantor is seised in fee simple or fee tail in possession, or has power to charge at that time, then the same are regulated by the statute 53 Geo. 3, c. 141. *(i)*

11. Corodies, &
12. Annuities.

13. Rents (*redditus*) is an annual render either in money, provisions or labour, in general, in retribution for land or other real property that has been conveyed or demised. *(l)* It must be reserved out of corporeal real property, and not in respect of incorporeal, *(m)* nor upon a letting merely of the use of personal chattels, as a flock of sheep, for if it be, it will have none of the incidents of rent, nor will be recoverable by distress, unless under an express power, but will, in legal contemplation, be a

13. Rents. *(k)*

(d) Com. Dig. Piscary; 2 Bla. C. 39, 40; Co. Lit. 127, 122, in notes; see 2 Chit. Pl. 875, note, *(d)*; 4 T. R. 437; 2 Hen. B. 182.

(e) 1 Campb. 312.

(f) Id. 577.

(g) 2 Bla. C. 40; 1 Tho. Co. Lit. 288, as to *Corodies*.

(h) Unless the deed contains an express charge and power of distress, in which case the annuity is a rent charge, presently

considered.

(i) See decisions thereon, Chit. Col. Stat. Annuities.

(k) See in general, 2 Bla. C. 40 to 43; 3 Bla. C. 6; 1 Thomas's Co. Lit. 439 to 487, and notes; 2 Roll. Ab. 44, b, pl. 7; 2 Saund. 202; 1 Thomas's Co. Lit. 441, 442; Cruise's Dig. Index, Rents.

(l) 2 Bla. C. 41, 42,

(m) 8 Bar. & C. 150.

CHAP. III.
I. RIGHTS
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sum in gross to be paid by instalments; but if rent be reserved upon the demise of a ready furnished house, ~~then it will be~~ considered as reserved in respect of the realty, and may be recovered by distress; (n) but it may be, as in the case of a rent-charge, wholly independent of any conveyance or demise.

At common law there are three descriptions of *rents*, viz. rent *service*, rent *charge*, and rent *seck*; and these again may be *quit* rents, *rack* rent or *fee farm* rent. (o) All these must properly be *annual* payments or renders in respect of *lands* or *tenements corporeal*, and cannot properly be reserved out of an advowson, a common, an office, a franchise, or out of other rent, or the like; and if so reserved, they are considered merely as *annuities*, operating only as a personal contract, and are not in legal contemplation *rents*. (p)

Rent service. Rent *service* is so called because it hath some corporeal service incident to it, as at the least, fealty, or his feudal oath of fidelity. (q) And this is frequently payable by a freeholder to the lord paramount, usually the lord of the manor, within which the freehold land is situate.

Rent charge. (r) A *rent charge* is where the owner of the *rent* hath no future interest or reversion expectant in the land, but an *express clause or power of distress*; and this may originate in two ways, as first, by a party conveying his whole estate in fee simple in land, but *reserving* to himself a certain annual rent payable thereout and charged thereon, with a clause of distress, in case the same shall be in arrear, and for which reason it is termed a rent charge; or secondly, by the owner in fee simple granting to another an annual rent in fee simple, or for life of the grantee, with a similar clause of distress, and therefore also called a rent charge. (s) The latter was the usual mode, before the recent act, of creating a qualification for killing game. (t) They were probably first adopted for the purpose of providing for younger children. (u) Where a rent charge is created by demising an estate for a long term of years, it is necessary for the grantee to enter in order to perfect his interest, or at least such an entry must be stated in pleading a title against strangers, unless it be alleged and shown that the grantee elected that the

(n) 2 New Rep. 224.

(o) 2 Bla. C. 41.

(p) Gilb. Rents, 9; 1 Tho. Co. Lit. 439.

(q) Co. Lit. 142; 1 Tho. Co. Lit. 442.

(r) See in general, 1 Tho. Co. Lit. 449.

(s) 2 Bla. C. 42.

(t) See form of Grant, Chit. G. 1. 726; Cald. 230; and as to the consequence of a *colourable* grant, 2 B. & Ald. 367; 2 Jac. & W. 565, 591.

(u) 1 Tho. Co. Lit. 448.

deed should enure by way of bargain and sale. (x) A rent charge *pur autre vie*, if grantee die, living *cestui que vie*, goes to the grantee's executor, though not named in the grant, in the nature of special occupant. (y)

On account of a rent charge issuing out of corporeal property, it is considered as so permanent and important a right, that if the owner thereof have a *freehold* interest in a rent charge, as for the term of his life, duly registered six calendar months before voting, he has a right to vote at an election; (z) and before the late act he was qualified to kill game. (a) When a deed reserves a clear rent charge, it is to be paid free from any deduction in respect of the land tax. (b) If land upon which a rent charge is charged be afterwards sold in parcels, and the grantee levy for the whole rent on one purchaser, the Court of Chancery will relieve him by a contribution from the rest of the purchasers, and restrain the grantee from levying in future upon him only. (c) A rent charge cannot be directly or indirectly, as by a warrant of attorney and judgment, charged on an ecclesiastical benefice. (d) In creating a rent charge, there should be an express power reserved to distrain upon growing crops, or upon common appurtenant, or in case of fraudulent removal; for otherwise, as the 11 Geo. 2, c. 19, does not extend to a rent charge, no such distress could be made. (e) If there be an express clause of distress, the grantee may distrain under it upon the grantor, or any person claiming under him since the grant was made, although a term may be vested in himself to secure the payment, (f) but he could not distrain for the rent charge upon a person in possession under a lease prior to the grant, but must, in that case, distrain only for the arrear of rent under the lease when the reversion has been assigned to him. (g)

Rent seck is a rent reserved by deed and payable in respect of corporeal property, but without any clause of distress, and therefore termed *siccus* or barren rent, and before the 4 Geo. 2, c. 28, s. 5, no distress could have been made for an arrear of that rent; but that statute, after reciting that the remedy for recovering rents seck, rents of assize, and chief rents, (now called *quit rents*,) are tedious and difficult, gives the power of

(x) 8 Bing. 99.

(y) 7 Bing. 178.

(z) 1 Bla. C. 173; 20 Geo. 3, c. 17; and see Reform Act.

(a) Cald. 230.

(b) *Bradbury v. Wright*, Dougl. 625.

(c) Cary, 2, 92.

(d) 1 Bar. & Adolp. 673.

(e) *Miller v. Green*, 8 Bing. 92.

(f) 2 Bla. R. 1326.

(g) 1 Roll. Ab. 669, 45; and see 1 Tho. Co. Lit. 478, n. 62.

(h) See the two legal meanings of the term *Seck*, 1 Thom. Co. Lit. 482, note (71).

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I. RIGHTS
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PROPERTY.

Quit rents.

distress to the owner of such rents, provided they have been paid for three years, within twenty years before the first day of the session of parliament in which the act was passed, or which should be thereafter created. *(i)* These were formerly termed rents of assize or chief rents, but now *quit* rents, and are sometimes payable as well by freeholders as copyholders, and are so called because by paying such rent the owner of the land goes *quit* of all other services. *(k)* Mere length of time, short of the statute of limitations, and unaccompanied by any circumstances, is not of itself a sufficient ground to presume a release or extinguishment of a quit rent, the punctual payment of which small render is rarely exacted with vigilance. *(l)*

Fee farm rents.

A *fee farm* rent has been defined to be a rent charge issuing out of an estate in fee, and perpetually payable in fee, and of at least *one-fourth* of the value of the lands at the time of its reservation; *(m)* for a grant of lands reserving so considerable a rent is, indeed, only letting lands to farm in *fee simple* instead of the usual methods for life or years. *(n)* But Mr Hargrave and others have expressed an opinion that this quantum of the rent is not essential to create a fee farm rent; *(o)* and others have considered that a fee farm rent is not necessarily a rent charge, but may also be a rent seck; *(p)* and if the latter, and if granted before the 4 Geo. 2, c. 28, in order to support a distress for the recovery of it, it would be necessary to prove that the rent had been paid for three years, within twenty years before the passing of that act. *(q)* It should seem that since the statute *quia emptores*, 18 Edw. 1, a *fee farm rent* could not be created, though sometimes attempted, and when accompanied with an express power of distress it would at least operate as a *rent charge*. *(r)*

Rack rents.

The term *rack* rent merely refers to *amount* and not to any particular description of rent, and imports a rent of the full annual value of the tenement or near it. *(s)* The 11 Geo. 2, c. 19, s. 16, and 57 Geo. 3, c. 52, use the term, and enact, that if any tenant, holding any lands, tenements or hereditaments at a *rack rent*, or where the rent reserved shall be three-fourths of the yearly value of the demised premises, at the least, shall be in arrear half a year's rent, and shall desert the premises or

(i) See construction *Bradbury v. Wright*, Dougl. 627.

(k) 2 Bla. C. 42; Cowp. 214.

(l) *Elridge v. Knott*, Cowp. 114.

(m) 2 Bla. C. 43; Co. Lit. 143.

(n) 2 Bla. C. 43.

(o) Co. Lit. 144, note 5; and see 1 Id.

by Tho. 446, note.

(p) Dougl. 627, note 1.

(q) Id. *ibid*.

(r) Co. Lit. 143, b., Mr. Hargrave's note 5; and see 1 Id. by Tho. 446, n. 5, 477.

(s) 2 Bla. C. 43.

leave the same uncultivated or unoccupied, so as no sufficient distress can be had, then justices may give him possession by summary proceedings. The term rack rent, as thus used in these acts, does not mean the rent *reserved*, but such a rent as the landlord and tenant might fairly agree upon, supposing the premises were vacant and unlet. (t)

By various inclosure and other acts, rents, usually termed *corn rents*, are made payable in lieu of tithes to the parson, subject sometimes to the poor rate, and sometimes not, according to the terms of the particular statute and are recoverable as directed by the same. (u)

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PROPERTY.

Corn and other
rents.

By the statute 12 Car. 2, c. 14, many of the *ancient military* and other tenures were abolished, (y) and only *free socage*, (now termed freehold,) *copyhold*, and *privileged villenage*, (such as ancient demesne and customary freeholds,) and *spiritual tenures* (such as frankalmoigne) were reserved. The *first* includes the ordinary tenures prevailing at this day, as principally and most generally *freehold*, (z) including also tenures in free burgage, (a) as borough English, (b) and certain customary burgage tenures and gavelkind; (c) the *second*, (*copyhold tenure*), varying by custom, in some respects, in each particular manor; (d) the third tenure, in *privileged villenage*, including *ancient demesne*, (e) and *customary freeholds*, (f) which are not

II. The differ-
ent TENURES by
which Corporeal
and Incorporeal
Real Property
may be holden.
(x)

(t) 2 B. & Ald. 652.

(u) 6 B. & Cres. 274; 3 B. & Cres. 863; 4 B. & Cres. 467; 6 Dowl. & R. 467.

(x) See in general Gilbert on Tenures, and 3 Tho. Co. Lit. Index, Tenure.

(y) The tenure in petit serjeantry is not wholly abolished. The tenure by which the lands and property granted to the Duke of Marlborough and the Duke of Wellington for their great military services are holden at this day, is of this kind of tenure, each rendering a small flag or ensign annually, which is deposited in Windsor Castle. This is, however, but socage tenure, in effect, because it is a yearly render of a thing certain, in the same manner as a rent; nor is the tenant bound to perform any other service. See Litt. s. 160; see Co. L. 108, b. note 1. The Reform Act, 2 & 3 W. 4, c. 45, expressly provides for rights to vote in elections to persons holding freehold, copyhold, ancient demesne, or by any other tenure whatever.

(z) See tenure in *freehold* in corporeal

and in incorporeal property, and in a rectory, rent, &c. pleaded, 2 Chit. Pl. 560 to 564, and notes.

(a) See tenure by *free burgage* pleaded 2 Saund. 234; 2 Chit. Pl. 560; and see points relating to burgage tenure, 1 Tho. Co. Lit. 392, 393; 3 Tho. Co. Lit. Index "*Burgage*;" and see 1 Bla. Com. 175, note 43; 1 Tho. Co. Lit. 59, in notes.

(b) See tenure in *borough English* pleaded 3 Went. 201; borough English lands shall be brought into hotch-potch under statute of distributions, 2 Stra. 935.

(c) See in general 2 Bla. C. 78 to 90, in notes; and see this tenure pleaded, 1 Burr. 326.

(d) See in general 2 Bla. C. 90 to 99; as to the mode of describing *copyhold* tenure, &c. 1 Saund. 348; Heath, Maxims, 145; Com. Dig. Pleader, E.; 2 Chit. Pl. 565, b.

(e) 2 Bla. C. 99.

(f) Scriven on Copyholds, 656; see *customary freehold* tenure pleaded, 2 Chit. Pl. 5 ed. 567; 9 Went. 124; and as to the statement of this estate, and the

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unusual in the northern counties of England. Corporeal real property, as well as most descriptions of *incorporeal* property, are in general capable of being holden by either of these descriptions of tenure. (g)

As respects tenure, the now repealed laws relating to the qualification to kill game, (h) and the recent reform act, (i) make no distinction whether the *tenure* be freehold, copyhold, ancient demesne, or any other tenure, and the owner and occupier of each, when of a certain yearly value, are entitled to vote, (k) though formerly copyholders could not vote at an election. (l) We have seen, that there may be different tenures as to different parts of the same land, or rather as to the different interests, that might, before the time of legal memory, have originally been carved out as to the same land. Thus one may hold to him and his heirs the *prima tonsura* of land as a copyholder, and another may hold to him and his heirs the soil, and every other beneficial enjoyment of it, as a freeholder. (m)

Freehold.

Although freehold is the most independent description of tenure, yet in law and substantially the land is considered to be holden of a superior lord, to whom sometimes *rent*, or suit and service at his court, is due, and who may require the owner to take the oath of fealty, and who, upon the death of the owner intestate without heir, is entitled to the estate by escheat. (n) This rent, sometimes payable by freeholders, is called chief rent, *redditus capitales*, or quit rent *quicquid redditus*, because thereby the tenant goes quit and free of all other services. (o) In all other respects the land and every thing upon it belongs absolutely to the owner, who may, as well at law as in equity, except in the case of a trustee, (p) alter the same, and cut and sell timber, and commit what would in others, holding by inferior tenure or title, be waste, with impunity, and even burn his own house, unless it be insured or likely to occasion damage to another person; (q) and as his tenure is superior in its advantages to any other, the owner should take

nature thereof, 3 Bos. & Pul. 378; 5 East, 51; 7 East, 305, where see the difference between freeholders and customary tenants explained. A customary freeholder may plead his title in a *que estate*, 2 Ld. Raym. 1133.

(g) Things *merely incorporeal* may be granted by copy of court rolls, *per* Willes, C. J., Willes's Rep. 324.

(h) 22 & 23 Car. 2, c. 25; Cald. 230.

(i) 2 & 3 W. 4, c. 45, s. 18, 19, 20, 25.

(k) See *post*.

(l) 1 Bla. C. 173, 174.

(m) 7 East, 200; 3 Smith, 261, S.C.

(n) 2 Bla. C. 86, 87, 9f. A legal manor ceases to exist as such for most purposes, if there be not two freeholders continuing bound to attend as suitors at the Court Baron, Bro. Ab. Cause a Remover, pl. 35; 2 T. R. 447; 10 East, 259; 2 Bla. C. 90, *ante*, 166, note (q).

(o) 2 Bla. C. 42, 43.

(p) 1 Mad. Ch. R. 120; For. 6; 2 Ch. Cases, 32; 5 Woodde's Lect. 399, *post*.

(q) 7 & 8 Geo. 4, c. 30, s. 2; *Rex v. March*, R. & M. C. C. 182.

care that the boundaries of the estate, when adjoining copyhold, be not confused, so as to subject the owner thereof to any claim of the lord of the manor, or the restrictions imposed upon copyholders. (r) The incidents of this tenure most materially distinguish it from copyhold. The owner of freehold tenure could always vote for a representative in parliament, but before the recent reform act a copyholder could not. (s) The owner is expressly enabled by the statute *qui emptores* to sell or transfer his freehold land, subject to the purchasers still holding by the *same* freehold tenure, and performing the like services to the lord as the vendor. (t)

But a copyholder cannot transfer his interest to a purchaser except by custom, and then only by intermediate surrender to the lord, and his grant to the purchaser. Upon descent of *freehold*, the heir is immediately entitled to the whole profits, without any admittance by the lord of the fee, (subject only to the widow's claim of dower, if not barred by jointure). It is transferable by the owner by feoffment, or by lease or release, fine or recovery. It may be absolutely demised for any term of years without the consent or controul of the superior lord. A moiety of the owner's interest may be seized under an elegit, and if he become bankrupt, or be discharged under the insolvent act, his entire interest may be sold and conveyed to a purchaser for the benefit of the creditors; (u) and if a trader die, his freehold estates are liable in equity to the payment of his debts, and fraudulent devises are invalid, (x) whereas copyhold could not be taken at the suit of a single creditor, or on an extent by the king. Freehold may be devised without any previous act, (y) but the will must be attested by three witnesses, (z) and after-purchased or acquired lands do not pass, a devise of freehold not being ambulatory or prospective. (a) The conviction and attainder of the owner forfeits only his life interest. (b) So also freehold property is by the common law subject to claims of curtesy and dower; but in copyholds, these can only arise from the custom of the manor, the latter being called freebench, which is sometimes of the whole property, and not like freehold, of only one-third.

(r) See *post*, as to bills to establish boundaries, *ante*, 196.

(s) 1 Bla. C. 173, 174; but now see 2 & 3 W. 4, c. 45, s. 19.

(t) 18 Edw. 1, c. 1; 2 Bla. C. 91, note 15.

(u) 6 Geo. 4, c. 16; 7 Geo. 4, c. 57.

(x) 11 Geo. 4, and 1 W. 4, c. 47.

(y) 32 Hen. 8, c. 1; 34 Hen. 8, c. 5; 2 Bla. C. 374, 375.

(z) 29 Car. 2, c. 3; Cowp. 90; 7 T. R. 399.

(a) 2 Ves. jun. 417, 419, 429.

(b) 54 Geo. 3, c. 145.

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The term "*freehold*" is sometimes used with reference to the *estate* or interest of the party in the lands, without reference to the *tenure* by which he holds them. Thus Lord Coke writes :—
" A freehold is taken in a double sense ; either it is named a freehold in respect of the state of the *law*, and so copyholders may be freeholders ; for any that hath an estate for his life, or any greater estate in any land whatsoever, may, in this sense, be termed a freeholder, in respect to the *land*, and so it is opposed to copyholders, that what land soever is not copyhold is freehold." (c) But this application of the term is extremely incorrect, for no person can be strictly considered as a freeholder, or entitled to the privileges of a freehold, unless the land to which his interest relates be of freehold tenure ; and although his interest in the land be of a duration equal to a fee-simple, yet, as the tenure by which he holds is base in its nature, he cannot be entitled to the privileges which attach to freeholds, and his interest alone is of a freehold nature, but his estate cannot be called properly freehold, unless he hold it by free tenure. (d)

Copyhold.

Copyhold tenure varies by custom in different manors. It may be not only of house, land, and other *corporeal* things, but also of most *incorporeal* things which may have been granted, though held by copy of court roll. Thus, a fair, or market, or tithes, may be granted by copy, and incorporeal things may pass by themselves without any land, and not as an incident, by copy. (e)

Originally a copyhold was a mere tenancy at will, but is now only nominally so, for the interest of a copyholder of inheritance is as certain and permanent, though subject to forfeiture, as that of a freeholder, and copyholds are to be governed by the rules of the common law, unless a particular custom intervene. (f) The owner is generally subject, like freeholders, to fealty, suit and service, payment of quit rent to the lord of the manor, and to escheat. (g) In this tenure the freehold is supposed to be in the lord of the manor, and not in the copyholder, though of inheritance, for which reason trustees are not essential, as in deeds relating to freehold tenure, to support contingent remainders of copyhold, the lord's estate sufficing. (h) In general, it is a tenure that must have been immemorial, and it cannot be

(c) Co. Cop. s. 15.

(d) Bla. Comp. Cop. ; see 1 Cru. Dig. 62.

(e) Willes, 324.

(f) 12 Mod. 301 ; 2 B. & Adolph.

440.

(g) 2 Bla. C. 97 ; as to the effect of enfranchisement, see 1 Marsh. R. 50 ; 11 East, 280. .

(h) 10 Ves. 282 ; 16 East, 406.

created at this day, at least without a *special custom* in the manor, authorizing grants of land as copyhold *de novo*; (f) and a custom for the lord to grant leases of the waste without restriction is bad. (k) But the lord may re-grant, as copyhold, after forfeiture, lands which have been immemorially demised by copy, even though he keep them in his hands for many years, because they were always demisable. (l) And where the lord re-granted such a copyhold, with the appurtenances, to which a right of common was, previous to the forfeiture, annexed, it was held that after such re-grant it was still a customary tenement, and the tenant entitled to right of common. (m) Like freehold, copyhold may be subject to special occupancy, (n) and we have seen that there may be different tenures with respect to the same land, and that therefore one may hold the *prima tonsura* of land as a copyholder, and another may have the soil, and every other beneficial enjoyment of it, as a freeholder. (o) Copyhold tenure, although the owner have an estate of inheritance therein, is still considered, in the eye of the law, for some purposes, as only a tenancy *at will*, and consequently, as a much less estate even than that of a term for years, (p) the copyholder being said to hold "at the *will* of the lord, according to the custom of the manor;" but though he holds at will, yet such must be in accordance with the custom, and not absolute. But the consequence of this tenure being only a tenancy at will is this, that if the copyholder take a conveyance of any interest carved out of the freehold tenure, however small, even an estate for years, it will operate as an extinguishment, not as a merger, of his copyhold interest. (q)

Copyhold tenure differs from freehold in the following respects: the 30 Geo. 3, c. 35, expressly prohibited any copyholder from voting at an election, (r) but the owner of copyhold of the yearly value of 10*l.* is now expressly entitled to a vote. (s) He may, on his becoming entitled by descent, or devise, or by purchase, be admitted and pay a fine to the lord, which is not to exceed two years' value, (t) after deducting the quit rents, but not the land tax; and unless there be evidence of a special custom the lord is not entitled to the payment of a full fine by

(i) 2 Wils. 125; 2 T. R. 415; 2 Maule & S. 504; 2 Bar. & Ald. 189; 3 Bar. & Ald. 153; 2 Campb. 264.

(k) 3 B. & Ald. 153.

(l) Id. *ibid.*; Co. Lit. 58, b; 4 Rep. 30, a; Cro. El. 699.

(m) 3 B. & Ald. 153.

(n) 2 Bla. R. 1148; 7 East, 186.

(o) 7 East, 200; 3 Smith, 261, S. C.

(p) Wiles, 325.

(q) See 3 Prest. Est. 539, 560.

(r) 1 Keny. Rep. 110; 1 Bla. C. 172, 174.

(s) 2 W. 4, c. 45, s. 19, 25, 26, *post*.

(t) *Leake v. Pigot*, Selw. N. P. 87; Dougl. 724; 2 T. R. 484; 3 Bos. & P. 346; 6 East, 57.

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the remainder-man upon his admission. (u) The steward may by custom be entitled to full fees on the admission to each of several copyholds, though where there is no such custom, he is only entitled to reasonable fees for his entire trouble. (x) The *property* in the soil, from the centre of the earth upwards, is always considered to be in the lord, but the *possession* in the copyholder, subject to certain peculiar local customs; (y) so that the copyholder has only the possession and use of the property as permanently affixed, and has no right without custom to dig mines or cut trees, excepting the latter for repairs; and on the other hand the lord cannot, as we shall presently see, without special custom, dig mines or cut trees, and if he do, the copyholder may sue him or a stranger in trespass for the injury, viz. the breaking the surface or sub-soil, or trespassing on his estate, or for the loss of the shade, and lop and crop and use of the trees for reparation and horse-bote and plough-bote. (z) If the owner (unless authorized by special custom, (a) cut timber trees otherwise than for reparation, or commit other waste, he forfeits his interest; (b) but the Court of Chancery will not grant an injunction to restrain a copyholder from cutting down timber. (c) A copyholder for life or lives cannot, even where there is a custom for copyholders to cut timber trees, do so at pleasure; (d) a custom for a copyholder for life to cut timber being unreasonable and void. (e) Waste, whether wilful or permissive, as letting his houses and buildings become decayed, is cause of forfeiture; (f) he cannot let to a tenant for a term of years, but only for *one year* or less, or strictly at will, without license from the lord, unless by special custom. (g) The demising absolutely for *one year* is not a forfeiture, such lease being, as Lord Coke observes, warranted by the *general* custom of the realm. (h)

(u) 8 Bing. 439.

(x) 2 Marsh. 84; 6 Taunt. 425.

(y) See *Lewis v. Brentwate*, 2 B. & Adolph. 437.

(z) Id. *ibid.* See Gilb. Ten. 327.

(a) 10 East, 267.

(b) 11 East, 56; 2 Maule & S. 68; 2 T. R. 746; 2 Taunt. 52; 1 Thom. Co. Lit. 673, A. 1; cutting trees for repairs, and afterwards exchanging the same for preferable timber is waste, 7 Bing. 640.

(c) 6 Ves. 700.

(d) 2 T. R. 746.

(e) Cro. Car. 220.

(f) Salk. 186; 1 Tho. Co. Lit. 673, note 32; and when a Court of Equity will relieve against forfeiture for waste,

Id. 674, in notes.

(g) 4 East, 221; 1 New R. 168; see cases in Chancery, 1 Tho. Co. Lit. 664, note 24; Id. 673, n. 32.

(h) 4 Co. 26; 9 Co. 75, b.; W. Jones, 249; 1 Tho. Co. Lit. 664, note 24; Id. 673, note 32. A lease for more than one year is a forfeiture, so is a demise for one year and so on from year to year; but it is otherwise if the demise be for one year with a mere *covenant or agreement*, that the lessee shall enjoy for another year; or if the demise be for one year, and from thence from year to year, for thirteen years, if the lord would license, and so as they should not be liable to forfeiture, for then the obtaining the license is a con-

The interest of the copyholder is forfeited to the lord for his life only (*h*) upon his conviction of *felony* after attainder, but not before, unless there be a special custom in the manor to the contrary. (*i*) But the interest of a copyholder cannot be affected by a writ of *elegit* or *extent*, or other process at the suit of a *single* creditor, (*j*) or even of the king, (*k*) though in case of *general insolvency*, and bankruptcy, (*l*) or discharge under the insolvent act, (*m*) his entire interest may be sold for the benefit of the creditors at large. But the recent act against fraudulent devises and subjecting the freehold estates of traders to the payment of their debts, does not extend to copyholds; (*n*) nor is the heir or devisee of a copyholder liable to be sued upon the bond or other specialty of his ancestor, as in the case of freeholds. (*o*) A *transfer* of copyhold cannot in general be effected by feoffment, lease, or release, or fine or recovery; (*p*) but usually must be by surrender to the lord to the use of the vendee, and presentment thereof by the homage, and by the lord or his steward's admittance of such *vendee* to hold by the rod at the will of the lord, and according to the custom of the manor, and upon which a fine must be paid by the purchaser, as before observed, to the lord, (*q*) and such surrender, re-grant and admittance, must be entered on the court rolls. (*r*) However, an equitable mortgage may be, and frequently is, effected upon a loan of money or security for a debt by a mere deposit of the prior copies of admissions, and other parts of the court roll relating to the estate, with a deed of covenant to surrender and do all other reasonable acts upon request. (*s*) But an equitable interest in copyhold lands

dition precedent, and these are the proper words in an agreement for a lease by a copyholder; 4 East, 221; 11 Ves. 170; 1 New R. 163; 2 Taunt. 52; 2 Maule & S. 255; and see 1 Tho. Co. Lit. 665; note 24; Id. 673, note 32.

(*h*) 54 Geo. 3, c. 145.

(*i*) 3 B. & Ald. 510; 2 Wils. 13; 5 B. & Cres. 584; 2 Ventr. 38.

(*j*) 1 Rol. Ab. 888; 2 B. & Cres. 242; 3 Dowl. & Ry. 603, S. C.; 3 Bla. C. 419.

(*k*) Parker, 195; Tidd, 9 ed. 1050, a recent attempt was made, in vain, to pass an act to subject copyhold to the satisfaction of debts to the king in consequence of the defalcation of a barrack-master-general. But as the recent Bankrupt Act, and the Insolvent Debtors' Act, in case of *general insolvency*, extend to copyholds, there seems no reason why

such copyholds should not be liable to be seized for debts to the king, and other debts, taking care of the interest of the lord.

(*l*) 6 Geo. 4, c. 16, s. 68.

(*m*) 7 Geo. 4, c. 57, s. 20.

(*n*) 11 Geo. 4 & 1 Wm. 4, c. 47, s. 2, 9.

(*o*) Id. *ibid.*; Bac. Ab. tit. Heir and Ancestor, F.

(*p*) 2 Bla. C. 367, 368, and notes.

(*q*) 2 Bla. C. 368 to 372.

(*r*) Id. *ibid.*

(*s*) It should seem that such an equitable mortgage is not of itself a perfect security, but at least the *covenant* should be *presented by the homage*, which would not entitle the lord to a fine as upon a complete surrender; 2 T. R. 484; 1 East, R. 632; but would operate as a security against a subsequent fraudulent perfect

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is not properly the subject of a surrender, but should be transferred by assignment. (*t*) In general an estate of inheritance in copyhold is as *devisable* by the common law (*u*) as freehold is by the statute, but there is this material distinction, namely, that a will of copyhold need not be attested by three witnesses, (*x*) and it will pass lands purchased or acquired after the date of the will, if the testator's intent to that effect be clearly declared; (*y*) for such a will is ambulatory till the death of the testator, and is considered as rather in the nature of an appointment or declaration of a use, than as a devise in the case of freehold. (*y*) There is, in strictness, another peculiarity, that there should be a surrender of the estate to the lord, to the uses of the will, either before or after the making of the will, though the omission is now supplied in certain cases by express enactment. (*z*) If there be no devise and no special custom to the contrary, the estate of inheritance of the deceased owner devolves in the same course of descent as in the case of freehold tenure. (*a*) And by custom, in many manors, whether the lands descend or are devised, the lord is entitled to a render of an *heriot*, as the best beast, or other goods (as the special custom may be) of the deceased owner. (*b*) And if the heir or other person, who may have claim, do not appear after three proclamations, at three successive general courts, the lord may by precept seize into his hands the land *quosque*, &c. that is, until the heir appear, but not as an absolute forfeiture, unless there be an express custom to warrant it. (*c*)

Rights of lord.

The lord of a manor cannot, without a special custom, enter the land of a copyholder to cut timber trees though going to decay, (*d*) or to dig for mines of coal or work the same, (*e*) and if he do he may be restrained by injunction, (*f*) or sued by the copyholder or his tenant as a trespasser; (*g*) and an incumbrance created by the lord on his manor and other rights, cannot pre-

surrender to another person, who by the court rolls would have implied notice of the equitable charge. But *quære* as to such implied notice, Suggl. V. & P. 759, 3d ed.

(*t*) 2 T. R. 484; Scriv. Cop. 267.

(*u*) 3 Bro. & C. 286; 15 Ves. 396; and a custom to the contrary is void, *Id.* *ibid.*; but see Evan's Stat. tit. Wills.

(*x*) 7 East, 299 to 322, unless the terms of surrender require three witnesses; *Id.* *ibid.*; 2 P. Wm. 258.

(*y*) Cowp. 130.

(*z*) 55 Geo. 3, c. 192; 7 Bingham, 275, when a Court of Equity, before this act, supplied the want of surrender in favour of a wife, or younger children, or creditors,

and when this act will still not aid the want of a surrender, see note 2 Bla. Com. by Chitty, 367, 368; 5 B. & Ald. 492; 1 Dowl. & Ry. 81, S. C.

(*a*) H. Chitty on Descents, 162.

(*b*) 2 Bla. C. 97.

(*c*) 3 T. R. 162; Watkins on Copyholds, 239; H. Chitty on Descents, 165; 1 Scriven, 341, 342.

(*d*) 4 Maule & S. 340; 2 B. & Adolph. 487; *ante*, 234.

(*e*) 10 East, 189; W. Jones, 343; 15 Ves. 236; 17 Ves. 281; 2 B. & Adolph. 437.

(*f*) *Id.* *ibid.*

(*g*) 10 East, 189; 2 B. & Adolph. 437.

judice a copyholder; (*h*) and the lord of a manor might be indicted for a forcible entry in the house or land of his copyholder. (*i*)

In some respects, therefore, although there is not in copyhold that *independence* of tenure as in freehold, nor is the same, when acquired, of equal value, because the party is subject to the small incumbrance of quit rent, and cannot cut timber for sale, or absolutely demise for a term of years without license, nor open new mines, unless by special custom; yet in some other respects the title evidenced by the court rolls is more secure, and the expense of transfer is less than in freehold conveyance, and the heir and devisee may take it free from liability for debts of the last owner. It may be worthy of notice that copyholds are excepted out of the registry act. (*k*)

We may here observe, that it has been held, that as the generality and vagueness of descriptions of copyhold property on the court rolls are so well known, a vendor of lands of copyhold tenure is not bound to show how the description on the court rolls is to be applied to the present state of the property, and that it suffices if he prove that the property as described has actually been enjoyed and passed under that description for upwards of sixty years. (*l*)

In case of copyhold as well as in freehold tenure, strips of land outside of old inclosures, and between them and an highway, are to be presumed to belong to the copyholder, although where such land forms part of a large open waste or common it might be otherwise. (*m*) It is treated as an unsettled point, whether an incroachment upon a waste, adjoining to the demised premises, by a lessee, without permission of the lord of the manor, or of the landlord, and uninterrupted possession thereof by such lessee for twenty years, shall give the lessee a possessory right thereto, or whether he shall be deemed to have inclosed the waste in right of the demised premises for the benefit of his landlord after the expiration of the term. (*n*)

Wastes adjoining inclosures.

(*h*) 8 Co. 63; 1 Tho. Co. Lit. 657.

(*i*) Gilb. Ten. 328, 329; 1 Tho. Co. Lit. 657, note D.

(*k*) For Middlesex, 7 Ann. c. 20, s. 17.

(*l*) 4 Russ. R. 267; and see *Doe v. Pearsy*, 7 B. & Cres. 304, which appears to establish that in copyhold tenure, land outside the external fence, and between the same and an high road, may be presumed to belong to the copyholder, and not to the lord.

(*m*) 7 B. & Cres. 304; *ante*, 195.

(*n*) Adams on Ejectm. 3d ed. 51, 52; 1 Esp. R. 460, 461; 2 Taunt. 160;

1 Taunt. 208; *semble*, that if such land belonged to the landlord, according to the presumption in 7 B. & Cres. 304, and the lessee threw down the old external inclosure and made the new fence serve as the external fence, the inclosure must be considered as made for the benefit of the landlord. But if the land inclosed belonged to the lord of the manor, then he alone could recover it. What is evidence of holding by permission of lord of manor, so as to prevent the statute of limitation being a bar to an action of ejectment, see 8 Bar. & Cres. 717.

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III. The different Estates or quantities and natures of INTERESTS in Real Property.

1 General outline of these.

III. *The Extent of Interest in these several things.* We now arrive at the consideration of what are termed in law the *estates*, or quantities of *interests* which a person may have in the several kinds of real things before enumerated, of whatever tenure the same may be. The term "*estate*," we have seen, (o) is used in two senses, the one of *locality*, and merely referring to the thing, the other, (the sense now used,) importing the *degree* or *extent* of the *interests* which a person hath in lands, or in any other subject of property, and to this term (at least in conveyances by *deed*) some adjunct or expression should be added, in order to show the *degree* or *extent* of such estate or interest, or in other words, the *time* for which the grantee's estate is to continue, "to him and his heirs and assigns for ever," or, "to him and the heirs of his body;" or more specially when an estate tail special, "to him and the heirs of his body, by E. his wife, for ever;" or "to him and his assigns for the term of his natural life;" or "to him and his executors, administrators, and assigns for the term of 21 years," &c. by which words respectively an *estate in fee simple*, or in *fee tail*, or an *estate tail special*, or *for life*, or *for years*, may be created, and the grantee is said to have an *estate in fee*, or in *tail*, or *for life*, or *for years*, or on condition, &c., according to the adjunct words. (p) Frequently, though untechnically, the word "*estate*" is used merely as a local description, as "all my *estate* at *Ashton*," and in a *will* this would convey the fee to the devisee, unless expressly restrained by other words, (q) though it would be otherwise in a *conveyance* by deed. (r) With reference to the *extent of interest*, the term "*real estate*" imports that a party's interest is not less than for the term of his life; for a term of years, even for 1000 years, perpetually renewable, is a mere *personal estate*; (s) and so is any interest carved out of or created by the owner of such term, though it import to be an estate of freehold in point of duration. (t) A *license*, in strictness, creates no *estate* or interest whatever in real property, and therefore is not within the statute against frauds, (u) for which reason also a party having it can maintain no action of trespass. (x)

The consideration of estates, in the legal sense, meaning the *interest*, as we now intend to use it, is divisible under several heads, as 1st. Whether the owner has an estate or interest of *inheritance* to him and his heirs generally for ever, or to him and particular

(o) *Ante*, 158.

(p) See 1 Preston on Estates, 20.

(q) *Ante* 159.

(r) *Ante* 159; 7 East, 259; 4 M. & S. 369; 4 Taunt. 176; 6 Taunt. 410; 2 Marsh. 113; and see Prest. on Estates, 20.

(s) *Ante*, 84, note (a); 148, note (r); 2 Bla. R. 386.

(t) *Post*.

(u) Sugd. V. & P. 8 ed. 73; Sayer, 8; see further *post*, License.

(x) 2 East, 190; 11 East, 345.

heirs, as to him and the heirs of *his body*, either generally, not specifying any wife, or by a particular wife, termed in *tail*: or 2dly. A freehold interest, but only *for life*, or whether for his own life, or that of another, or as tenant in dower, or by the curtesy; or 3dly. A still less interest and estate, *less than freehold*, as only for a *term of years*, or the most inferior, as at will or by sufferance, which, however, are not *real estates*, but chattel *interests* in realty, though for a term of 2000 years. (y) It is essential, concisely to consider each of these; for though the full study of them constitute more peculiarly the learning and science of conveyancing, yet a practical knowledge of the leading rules is absolutely essential to all concerned in the administration of the poor laws, and many branches of the criminal law, and to every branch of the legal profession. We must also keep in view the highly important distinctions between *legal* and *equitable* interests, which will presently be more particularly examined.

It is essential first to distinguish between what is an *actual interest* in real property, and what is a *mere power* or *authority* to exercise a *jurisdiction*, or do some act upon, over, or to the same. This is a distinction in various respects of most extensive importance, for although persons may have full power and jurisdiction over land, yet if they have no legal *interest* therein, they cannot be considered as the occupiers thereof, and they are not rateable to the poor, nor would be entitled to vote in respect thereof; nor could support any action of trespass for any injury; nor would there be any implied right to compensation for the use of the land. (z) Thus where a statute authorized certain persons to make the river Avon navigable, and to maintain such navigation, and for those purposes to clear, scour and cleanse the same, and to dig and cut banks, and to build bridges, sluices, locks, &c. and to do all other necessary things, it was held that they could not be deemed the occupiers of the land covered with water, nor rateable to the poor in respect thereof, but had a mere easement in the watercourse, though they were liable to be rated in respect of a certain cut and lock, which they had made for the purposes of the navigation upon lands purchased by them. (a) So although commissioners of sewers have a very extensive *jurisdiction* over sewers and the banks of the adjacent lands and works relating to the same, yet it does not follow that they in legal contemplation have any

2. Important distinction between an *interest* and a *mere authority* over real property.

(y) *Ante*, 84, note (a).

(z) See in general *Rex v. Thomas*, 9 B. & Cres. 114; and the several cases there quoted, and *Newcastle, Duke of, v. Clark*,

2 J. B. Moore, 616; *Rex v. Aire Navigation*, 3 B. & Adolp. 159; 8 B. & Cres. 42.

(a) *Rex v. Thomas*, 9 B. & Cres. 114.

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interest in, or even actual or constructive possession of, the property over which they have jurisdiction; therefore commissioners of sewers cannot maintain an action of trespass against the commissioners of a harbour for breaking down a wall or drain erected by the former, as such commissioners, across a navigable river; because the authority to be exercised by such commissioners of sewers on behalf of the public does not vest in them *such* a property, or even possessory *interest*, as will enable them to maintain such action even against a wrong-doer: (b) and the same principle has been applied to persons authorized by statute to make and maintain a navigable river, and it was held that the proprietors of such navigation did not necessarily acquire *such* an *interest* in the soil in a bank excavated from a new channel made by them, for the first time, under the act, as would enable them to maintain trespass. (c) For the same reason, although the owners of a mere navigation have jurisdiction, to a limited extent, in the bed of the canal, and its banks, and locks, and drains, it was recently held that they have no *interest* in the soil, or any thing corporeal, therefore are not rateable to the relief of the poor, as occupiers of land; (d) and where an act, incorporating the Hull Dock Company, authorized them to make a dock, quays, wharfs, &c., and which were to be vested in them for certain public purposes, and giving them right to certain wharfage for goods *landed* or *discharged* upon such quays or wharfs, it was held, that as the premises were only vested in the company for the purposes of the act, they had no common law right to a compensation for the use of them, and that as the statute gave them no right to claim wharfage for goods *shipped off* from other quays, they could not maintain any action upon a supposed contract to pay wharfage for such use of the wharfs, though, if they had had a common law interest in the wharfs, such a contract would have been implied. (e) So, where it appeared that the plaintiff in an action was a person who had assigned over all his effects under an insolvent act, and that his wife continued to reside in his house, retaining some of the furniture, and that the wife having been absent for two days, and no one being in the house, the defendant committed a trespass in an attempt to distrain for rent; it was held that the wife had not a sufficient possession to enable her husband to sue in trespass, he neither having any legal interest, nor any actual or constructive possession; (f) and where the plaintiff, having built a chapel, conveyed the same to the

(b) *Newcastle, Duke of, v. Clark*, 2 J. B. Moore, 666.

(c) *Hollis v. Goldfinch*, 1 B. & Cres. 205; 2 Dowl. & R. 316, S.C.

(d) *Rex v. Aire Navigation*, 3 B. & Adolph. 139.

(e) 8 B. & Cres. 42.

(f) 6 Bing. 515.

defendant by a deed, the validity of which was questionable, and the defendant took possession, and gave the key to a gardener, who, with his permission, lent it to the plaintiff, merely to enable him to enter and preach in the chapel upon a Sunday, and the plaintiff thereupon locked up the chapel, and refused to re-deliver the key, it was held that he had not sufficient possession to maintain an action of trespass against the defendant for breaking open the chapel. (g)

3. A person who has merely a *license* to use land has not such an interest therein as to enable him to maintain an action of trespass; (h) though, if he were, in fact, in exclusive possession, without any right or title whatever, or under a void title, he might sustain that action against a stranger. (i) But here we must distinguish between a mere license to use land in common with others, and a license or agreement to have the whole use of the same; for if the latter be valid at all, it would be equivalent to a demise, and operate as a lease. (k) We shall hereafter consider the validity and effect of a license, when we consider the different modes of acquiring a right to real property. (l) It may be here observed, that a beneficial license to be exercised upon land, but not conferring any interest in the land, may be granted without deed or writing. (m)

3. Distinction between a mere license and possession, or an interest.

4. With regard to strangers, who cannot themselves establish any *title* to the property, which is the subject in contest, it is seldom necessary to prove the nature or extent of the interest of the claimant, or to produce any title-deeds whatever; and the mere proof of twenty years' undisturbed *possession* of real property corporeal, or of the enjoyment of real property incorporeal, (the effect of which we shall have occasion to consider more fully among the modes of acquiring property,) is sufficient, and affords a presumption in favour of the highest or largest estate that a person could possibly have in the subject-matter. (n) Such presumption may, however, be rebutted; and under these and other circumstances, recourse must occasionally be had to the proof of the precise nature of the estate, or degree of interest of the owner, and how he acquired the same, and which, therefore, we will now examine practically.

4. Twenty years' possession *prima facie* a sufficient title.

5. The different *estates* or *degrees of interests* are divided into such as are *freehold*, and such as are *less than freehold*.

(g) 5 Bing. 7; 2 Moore & P. 12, S. C.

(h) 2 East, 190; 11 East, 345.

(i) 1 East, 41.

(k) 1 Vin. Ab., License, 92.

(l) And see, as to license, Sugden's V. & P., 8 ed. 73, 75; and Sayer's Rep. 3.

(m) 8 East, 308; 7 Taunt. 374.

(n) See post; and see 3 Car. & P. 610.

5. Extents or quantities of interest enumerated, and in what property they may be created.

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Those of *freehold* are either of *inheritance*, descending from ancestor to heir, whether in fee simple or limited, as in fee tail; or are *freehold not of inheritance*, as for the life of the owner, or for the life of another person or persons, and ceasing upon death; or are by the curtesy and in dower. Estates *less than freehold* are for years, from year to year, at will, or at sufferance, and to these are added estates *upon conditions* of various descriptions, as to cease upon a certain specified event; and the estates of mortgagees, and tenants under statutes staple or statute merchant, or by *elegit*, are classed as of this nature, their interests determining when the debt has been satisfied. (o) It will be observed that Blackstone, in enumerating these several estates, considers them only as applicable to *freehold* tenure, and notices estates in copyhold merely as a subdivision of estates *at will*. But it must be kept in view that, though it cannot be properly said that a person has a *freehold*, (p) either of inheritance or for life, in a copyhold, yet he may have an *estate* of inheritance, or an *estate* for life, or dower, (and then called freebench,) or for years in a *copyhold*, and descending and continuing, or ceasing, precisely the same as in freehold tenure, and in general copyhold tenure (subject to the custom of each manor) is as capable of subdivision in degrees of estate or interest, &c. as lands of freehold tenure, and, in many respects, the rules applying to freehold estates will equally apply to copyhold, as regards the *estate* or *degree* of interest therein, though subject to certain peculiar incidents affecting all or most copyholds which do not extend to freehold, on account of the peculiarity of the tenure.

Power of alienation how far incident to every degree of estate.

There is one incident to every description of tenure and estate, (excepting leases by copyholders,) namely, that unless expressly taken away by the terms of the conveyance, the owner has a right to alienate either the whole or a part of his estate, whether he is entitled to an estate of inheritance in fee-simple, or for a year, or a time certain, less even than a year, in lands of freehold tenure, (q) or his interest as a leaseholder in lands of copyhold tenure, who holds an estate by the rules of the common law, and not a customary estate, (r) and he may either convey or assign his *entire interest*, or may carve out *less interests* therein, unless such power be expressly prohibited, as it may be, and as occurs in estates upon condition, and more frequently in leases for years, where a landlord having the *jus disponendi*

(o) See 2 Bla. C., chap. 7 to 10, and pages 103 to 162.

(p) *Ante*, 232.

(q) 1 Tho. Co. Lit. 636, note (k); Doct. & Stu. 27; 15 Ves. 264.

(r) Com. Dig. Cop. K. 3.

may annex any lawful terms to his grant or demise; (s) and a parol interest, as tenant from year to year, may even be seized and sold under a *fieri facias*. (t) But it may be here noticed that no restraint of the power of alienation (except to a particular person) can be imposed upon the grantee of an estate in fee, such a condition being void, as repugnant to the nature of the estate given. (u) Even a tenancy from year to year, unless the landlord determine it, might endure for ever, and on this account such a tenant may grant a lease for twenty-one years, and he has, in contemplation of law, a reversion, so as to enable him to distrain. (x)

The utmost time allowed by law, in order to guard against perpetuities, during which freehold estates of inheritance and fee-tails therein, and also leaseholds and personal property, may be limited, so as to be rendered unalienable, is during the existence of a life, or of any number of lives in being at the time the limitation is created, and *twenty-one years* after, and *no longer*, or in case of a posthumous child, perhaps a further period of nine months, to allow for the birth, but that is the utmost extent of prohibition will be given effect to; (y) and, in case of an entailed estate, immediately the first tenant in tail comes into possession, he may bar it by a common recovery, the power of suffering which for such purpose cannot be restrained by any condition, limitation, or covenant; (z) therefore there is no danger of perpetuity, for any tenant in tail might, if he should so think fit, bar the entail. (a) Copyhold tenure is an exception to these rules, for the owner cannot, as we have seen, *demise* for more than a year, or *from year to year*, without an express license from the lord of the manor. (b)

It is another general rule, that if a person have an interest less than an absolute estate of inheritance, and he attempt to convey a larger estate than he himself has, he *forfeits* his own interest by such assumption of greater interest than he really has; as if a tenant for life or for years convey an estate in fee, the person in remainder may immediately take advantage of such forfeiture, and instantly take possession, as if the particular estate had determined by efflux of time. (c) But a conveyance

Forfeiture by
alienation of
a larger interest
than party has.

(s) 2 T. R. 133.

(t) 1 Marsh. 10.

(u) Litt. s. 360, 361; 8 T. R. 61.

(x) 2 Chitty's R. 461.

(y) 1 Sim. R. 173; and see a useful note, 1 Tho. Co. Lit. 516, in note 7; 2 Id. 578, note A.; 3 Id. 296, note D.; and Chit. Eq. Dig., tit. Perpetuity.

(z) 1 Inst. 223, b; 1 Burr. 84; 1 Rep.

83; 6 Id. 40; 10 Id. 37.

(a) 1 Saund. 147; 2 Bro. C. C. 215; 4 T. R. 13.

(b) *Ante*, 234, 235.

(c) Co. Lit. 251; 2 Bla. C. 294, 295, and notes; 1 Co. 14, b; 1 Saund. 319, b; when not a forfeiture, Co. Lit. 251, b; 1 Prest. Conv. 202.

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by lease and release, bargain and sale, or covenant to stand seised by a tenant for life, will not create a forfeiture, (though a feoffment would,) (*d*) these being what are technically termed *innocent conveyances*, inasmuch as they can transfer no more than the party conveying has. Of this nature also is a *disclaimer*, by any person who has less than a freehold estate of inheritance, to hold of the lord or landlord, who may therefore treat such disclaimer as a forfeiture, and proceed to eject the occupier. (*e*)

Distinction between freehold and leasehold interests.

There are several other leading distinctions between freehold estates or interests, and those which are less than freehold. The former are termed *real* estates, the latter *personal* estates. (*f*) One is, that a freehold interest (that is, an interest to endure for life or longer,) must be created either by feoffment, which applies only to corporeal property, or by *deed under seal* operating under the statute of uses; and that no freehold interest, even in an incorporeal hereditament, as a right of common or way, can be created by parol or by unsealed written instrument; (*g*) whereas an estate or interest less than freehold, as a lease or demise even for 1000 years, may be created without deed, except in an incorporeal hereditament; (*h*) and before the statute against frauds, which requires a signed instrument when for a term exceeding three years, might have been even by mere words. It is for this reason, that if a rector grant or demise his tithe by a mere written instrument, not under seal, he is still, in point of law, the owner and occupier of the tithe, and to be rated in respect thereof, because the legal interest in tithe passes only by grant under seal; whereas if the same instrument had been under seal, the lessee, acquiring the legal interest in the tithe, would be the proper person to be rated. (*i*)

Another rule is, that an estate of *freehold* cannot be derived from an estate for years; and therefore, where a rent was granted for life out of a long term of years, though it was resolved to be a good charge as long as the term lasted, yet the court held it to be only a chattel, and not a freehold. (*k*)

Another great distinction is, that a *freehold* estate cannot commence *in futuro* by a *common law* conveyance, as by feoffment and livery, which must be at the time of the feoffment; (*l*)

(*d*) Willes, 268.

(*e*) 2 Bla. C. 276; Bul. N. P. 96; Peak. R. 196; 2 Sch. & Lef. 625. *post*.

(*f*) *Waldron v. Howell*, 3 Russ. R. 376, and where it was holden that a leasehold for years, though perpetually renewable, cannot be deemed *real* estate.

(*g*) 8 East's R. 167; 5 B. & Cres. 875.

(*h*) 5 B. & C. 875.

(*i*) 1 Eagle on Tithes, 19; 1 Stra. 525; 16 Vin. Ab. 427; 4 Man. & R. 334; 9 B. & Cres. 479; Burn's J., Poor, 68, 69.

(*k*) *Butt's* case, 7 Co. 23, a; 1 Tho. Co. Lit. 635, note H.

(*l*) 2 Bla. Com. 143, 144.

but by a conveyance under the statute of uses there may be a creation of a freehold to commence *in futuro* with only an estate for years intervening; (*m*) and a lease for lives to begin from the day of the date thereof with seisin delivered *afterwards* is good, and shall not be said to convey a freehold to commence *in futuro*. (*n*) So the lessee under a lease for lives *in futuro* and who has covenanted to pay rent will be estopped, whilst he continues in possession, from insisting that being a lease for lives it could not commence *in futuro*, or be granted without livery of seisin, or lease and release, or bargain and sale. (*o*) But with respect to chattels real, as a lease even for 1000 years, it may, unless expressly prohibited, (as in leases by tenants in tail, (*p*)) be created to commence *in futuro*. (*q*)

Another rule is, that no freehold interest in remainder can, *by any common law conveyance*, be supported by an intervening estate less than freehold. (*r*)

So a freehold interest cannot merge in a chattel interest, though the latter may merge in the former (if both be equitable or both legal estates, but not otherwise); consequently if an estate of freehold for the term of his life vest in a person who is owner for a term of 1000 years, the freehold interest, though substantially of shorter duration, will not merge, but the term will merge in the freehold, (*s*) unless in case of a mere *interesse termini*. (*t*)

In pleading also a freehold interest in possession, the owner is stated to be “*seised* in his demesne as of freehold for the term of his natural life,” (or if the interest be in incorporeal property, the words “in his demesne” are to be omitted); whereas the owner of a term of years is alleged to be “*possessed* of the tenements for the residue of a certain term of years, commencing from, &c. and then unexpired;” (*u*) or if the term is to commence *in futuro*, he is then “*possessed* of the interest in a certain term, to commence on, &c. of and in certain land, &c.” (*x*)

Interests of
inheritance in
what things.

The same different estates or *degrees* or quantities of interest may in general exist equally in freehold or copyhold, or in any other tenure; and in each a person may have an estate of inheritance descending to him and his general heirs, according

In *fee*.

(*m*) 1 Sanders' U. & T. 128; 2 Id. 7, 98; 2 Prest. Conv. 157; 2 Bla. Com. 165, note (2).

(*n*) 2 Wills. 165.

(*o*) 1 Bro. P. C. 67.

(*p*) 32 H. 8, c. 28.

(*q*) 5 Coke, 94; 1 Tho. Co. Lit. 636, note K; 2 Bla. C. 143, 144.

(*r*) 2 Bla. C. 170, 171.

(*s*) 11 Co. 83; 3 Prest. 219, 221; 1 Tho. Co. Lit. 635, note 1.

(*t*) 5 B. & Cres. 111.

(*u*) 2 Bla. C. 144, 106; Co. Lit. 17 a, b, note 1.

(*x*) 1 Saund. 251, n. 1; 2 Saund. 176; Clift's Ent. 22, n. 5.

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to the nature and custom of each separate tenure. And the like estates may exist as well in relation to corporeal as incorporeal property, although in describing a corporeal inheritance a man shall be said to be "*seised in his demesne as of fee*," but of incorporeal "*seised as of fee*," and not "*in his demesne*." (y) Thus a person may have such an estate in freehold land, copyhold land, an advowson, or a fee farm rent, as that upon his death *the same* will in each case descend to his eldest son; and copyholders have a *freehold interest*, though not a freehold *tenure*. (z) A copyholder may in most manors be tenant in fee simple, in fee tail, for life, by the curtesy, in dower, (then usually termed *freebench*,) for years, at sufferance, or on condition, subject however to the particular custom of each manor. (a)

In tail.

So a person may have an *estate tail* as well in lands of freehold and copyhold, or other tenure, as in incorporeal hereditaments, which savour of the realty, that is, which issue out of corporeal property, or which concern or are annexed to or may be exercised within the same, as rents, estovers, commons, and the like. Also offices and dignities, which concern lands, or have relation to fixed and certain places, may be entailed. (b) But property of copyhold tenure can only be *entailed* by the *special* custom of the manor. (c) And the mode of getting rid of such entail is also regulated by the custom of the particular manor, which in some manors is by recovery, in some by surrender only, in others by either of those modes concurrently. Estates tail, being freeholds of inheritance, confer the same right of voting as estates in fee. (d)

For life.

An interest or estate for the *life* of the party himself, or *pur autre vie*, or for the lives of several other persons, or in several successively for the life of each, may also exist in freehold or copyhold, or in land of any other tenure, and as well in incorporeal things as corporeal, provided the limitations be consistent with the rule against perpetuities. So a man may be tenant by the curtesy of some incorporeal things, as an advowson, if in gross, but not if appendant to a manor, unless he had actual seisin of the manor itself during the life of his wife; (e) and a woman may have an estate in dower, not only in all her husband's lands, but also in all his tenements and hereditaments,

(y) Litt. s. 10.

(z) 1 Prest. on Estates; 5 East, 51; ante, 232.

(a) 2 Bla. C. 149.

(b) 2 Bla. C. 112, 113; 7 Co. 33;

Willes, 324.

(c) Id.; 3 Co. 8; 2 Bla. C. 113.

(d) See post.

(e) 2 Bla. C. 127, note 14.

corporeal and incorporeal, subject to some restrictions, as in the case of a castle or of common without stint, (f) or of such estates as were vested in the husband as trustee or mortgagee, which latter, though subject to dower at law, are protected in equity against the widow's claim.

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An estate *for years* may be created in all description of corporeal property, and in some things incorporeal, and even in personality. A person may be lessee for a term of years of a manor, and all the rights of franchise, and being thereby lord of the manor for the time being, may depute a gamekeeper to preserve or kill game within the precincts of the manor. (g)

As respects the *modes* of creating these several and different estates or interests in land, there are in general appropriate words, of the legal import of which all members of the profession must be well informed, in order to determine, upon reading a deed or will, what interest a party takes in different descriptions of property. Estates or interests, whether in corporeal or incorporeal property, may, at least as respects many of them, be created by, 1st, convention, as by conveyance or will; 2dly, by operation of law; or 3dly, by implication. Those by convention are by express words in a deed or will, to which words particular significations have, by a current of decisions, been given. Those by operation of law are principally estates tail after possibility of issue extinct, tenancy by curtesy, and tenancy in dower. Estates by *implication* pass usually *by a* will, without *any* express words to direct the course; as where a man devises land to his heir after the death of his wife, here though no estate be given to the wife in express words, yet she shall have an estate for life by implication, for the intent of the testator was clearly to postpone the heir till after her death, and if she do not take it, nobody else can. (h) So in cases of *resulting trusts*, the heir may be said to take the estate or interest by *implication*. (i)

Estates or interests, how or by what words respectively created:

To create an estate of *inheritance* by express words in a deed, the word *heirs*, in the plural number, is essential, in order

Creation of interests of inheritance, by what

(f) 2 Bla. C. 132; Co. Lit. 31, 32; 1 Jon. 315.

(g) Chit. Game Law.

(h) 2 Bla. C. 381; 1 Went. 376. *Aliter*, if the estate had been devised to a *stranger*,

and not to the heir, for then the heir would be entitled to the intermediate profits, Cro. Jac. 75; 2 T. R. 209.

(i) 2 Bla. C. 335.

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to make a fee or inheritance, for if land be conveyed by deed to a man for ever, or to him and his assigns for ever, or to him and his heir, in the *singular* number, this vests in him only an estate for life; (*k*) but if a person seised in fee of lands under a conveyance to him were to convey the same to another "as fully as they were granted to him," the fee simple will pass without any limitation to the heirs in express terms. (*l*) It is the practice at this day, in conveying an estate in fee, to limit the property to the grantee and his heirs and assigns for ever, but the word assigns is wholly unnecessary and immaterial. (*m*) In a conveyance to a corporation the words of limitation are "successors," (not heirs,) and in a grant of lands, even to a sole corporation, the word "heirs" would not convey a fee any more than the word "successors" would in a grant to a natural person entitle the heir to inherit; and a limitation to a person in his politic capacity, and to his heirs, would give him only an estate for life. (*n*) But if the grant be to "heirs and successors," that which is appropriate will operate, and the other be rejected as superfluous. (*o*)

In a *will* an estate of inheritance may pass without any words of limitation to the heirs, whenever it can by any means be collected from the terms of the will itself, but not from *extrinsic* evidence; that it was the intention of the testator to give an estate or interest of that extent; thus, under a devise "to a man for ever," or "to one and his assigns for ever," or to one "in fee simple," *without the word heirs*, the devisee hath an estate in fee simple, for the intention of the devisor is sufficiently plain from the words of perpetuity annexed, though he hath omitted the legal words of inheritance; (*p*) and in construing *wills*, the testator is supposed to have wanted that professional assistance of which a party to a *deed* may always avail himself, and wills are frequently prepared with more expedition than in the case of deeds; besides, that being an *ex-parte* proceeding, probably so much attention and consideration are not exercised as in cases of deeds, where two parties are concerned in framing the same. (*q*) The law therefore regards the intention more than the precise legal import of the words in which the testator has expressed his meaning, and as

(*k*) Co. Lit. 9, a; Com. Dig. Estate, Lit. 8, b; 9 Id. 94, b; 2 Prest. Est. 6, 7. A. 2; Shep. Touch. 101.

(*l*) Id. *ibid.*; 2 Prest. on Est. 2.

(*m*) 2 Prest. Est. 3.

(*n*) 1 Tho. Co. Lit. 191, n. (3); Co.

(*o*) Co. Lit. 9, a.

(*p*) 2 Bla. C. 108.

(*q*) Treat. on Equity, 59, s. 2; 2 Eu-

nomus, 47; Latch. 42, *per* Dodderidge, J.

often as it can be collected from any circumstance *in* a will, or can from the whole will taken together and applied to the subject-matter, be reasonably inferred that the testator intended to pass *all his estate* in the property, that estate will pass, although the property be not limited to the heirs of the person to whom the devise is made. (r) But when by a previous current of decisions, certain words of a will have received a lucid exposition and import, they will in general govern, as it may be supposed that wills have been subsequently framed in the same words upon the faith of such decisions. These are therefore to be adhered to, although they will frequently carry no more than a life estate, and although such construction may not effectuate the apparent intention of the testator to give a fee simple. (s) The decisions establish that if a testator by his will give his *estate* or *estates in* or at *Dale*, though neither heirs, assigns, or any other word be annexed to the devisee's name, yet he takes an estate in fee simple, unless there be other words denoting a contrary intention, for the word "*estate*" so used, denotes the *entire interest* of the testator, and not a mere local description of the land; (t) though a devise of "my perpetual advowson" would only give an estate for life in such advowson. (u) So where lands are given *charged* with the payment *by the devisee* of a specific sum, and which is not to be raised gradually out of the rents and profits as they may arise, but to be absolutely paid by the devisee, such a devise, without words of perpetuity, will carry a fee simple, for otherwise the devisee might be a loser, by dying before he had been repaid the sum directed to be paid, and it is not to be supposed but that the testator at all events intended that he should derive some benefit, which he could only acquire by having the fee; (x) and the same reason prevails where land is by the will charged with the payment of annuities, unless where an estate tail is given to the devisee. (y) But if the debts to be paid by the devisee are merely a charge on the *estate* devised, and to be paid only out of the profits thereof, and not a personal charge on the devisee, then he will not take the fee, but only a life estate, unless the will contains express words of perpetuity. (z) And where a

(r) *Per* Lord Mansfield, Cowp. 352, 235. See instances, 2 Prest. Est. 69 to 77; 7 East, 259; 4 M. & S. 369; 4 Taunt. 176; 6 Taunt. 410.

(s) *Per* Lord Tenterden, *Doe v. Tucker*, 3 B. & Adolp. 476.

(t) 7 East, 259; 4 M. & S. 369; 4 Taunt. 176; 6 Taunt. 410; 2 Marsh. 113.

See Rules of Construction of Wills, note (15), 2 Bla. C. 381; *ante*, 159.

(u) *Ante*, 217, note (l).

(x) Co. Lit. 9, b; 3 T. R. 356; 6 T. R. 1.

(y) 5 T. R. 335.

(z) 4 East, 496.

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testator leaves all his "*hereditaments*" to *A.* the latter takes only an estate for life, that term being considered as referring only to the things, and not to the *entire interest* therein. (a) So, "I also bequeath to him *my chambers* in Albany, for which I paid 600 guineas, with all my furniture, except such articles as I may particularly except from this donation," will only pass a life estate, although the testator had recently, before making his will, for the named sum, purchased the fee simple in such chambers, and although the court considered that they had no doubt the testator intended to give the fee. (b) And where a testator devised as follows, "I give and bequeath my freehold estate called *Poimcetts, &c.*" after an estate for life therein, it was held to pass only an estate for life in remainder; and Lord Tenterden observed, the term "estate" *may* operate only as a description of the particular lands, or *may* mean also the quantity of the testator's interest in them. (c) A fee also will not pass by general introductory words, by which the testator declares his intention to dispose of "all his estate, both real and personal," if there be not afterwards in the will some specific words passing the fee, for those words, like the term *hereditaments*, are in that case taken to mean only the thing, without regard to the interest therein. But if there were such subsequent words, in some degree ambiguous, then the introductory words "estate," &c. may have some effect, as indicative of the intention of the testator. (d) And a devise to a man and his assigns, without the words "for ever," or annexing words of perpetuity, passes only an estate for life. (e)

Heirship is *implied* in the creation of *nobility*, unless expressly excluded. In creation of nobility by *writ*, the peer, without the word "heirs," hath an estate of inheritance in his title; but not so in creation by *patent*, which is *stricti juris*, and without express words of inheritance there will be no inheritance in the title. (e)

Interest in tail
by what words
created.

An *estate tail general* is usually created by the words "to *A.* and the *heirs of his body*," and by which only his *lineal* descendants can take in exclusion of collateral relations; an estate in *tail male* by the words "to *A.* and the *heirs male* of his body," excluding even lineal females. If lands be given "to a man

(a) 5 T. R. 558; ante, 153.

(b) *Lushington v. Sewell*, 1 Sim. 435; *Day v. Parratt*, 3 B. & Adolp. 469. But if instead of "*chambers*" the word "*estate*" had been used, it would have been other-

wise, *Bailis v. Gale*, 2 Ves. 48, cited id. 476.

(c) *Doe v. Tucker*, 3 B. & Adolp. 473.

(d) 5 T. R. 13; 6 T. R. 610.

(e) 2 Bla. C. 109.

and the heirs male of his body begotten," this is an estate in tail male general, but if "to a man and the *heirs female* of his body on his present wife begotten," this is an estate in tail female special. (g) The word "*heirs*" is necessary to create a fee, and the word "*body*" (or some other words of particular procreation by a particular person or persons (h), is necessary to create a fee tail, and to ascertain to what heirs in particular the fee is limited; and if omitted, no estate tail will be created. As if a grant be to a man and *his issue* of his body, to a man and his *seed*, to a man and his *children*, or offspring, all these create only estates for life, there wanting the words of inheritance "*the heirs of*." So on the other hand, a conveyance to a man and his heirs male or female (omitting the words body of a particular person or persons) creates an estate in fee simple, and not in fee tail; because there are no words to ascertain the body out of which they shall issue. (i) But in *wills* greater indulgence is allowed, and an estate tail may be created by a devise to a man and his *seed*; or to a man and his heirs male; (k) or by a devise to a man and his children, if he have no children at the time of the devise; (l) or to a man and his posterity: (m) or by any other words which show an intention to restrain the inheritance to certain particular descendants of the devisee. (n)

An interest or estate for *life* may be created, not only by the express words of a deed or will, but also by a general grant or devise, without defining or limiting any specific estate; and in which case it is an intendment of law that the grantor and testator meant that *the donee* should enjoy the thing during the whole of his life. As if *A.* grant to *B.* the manor of Dale, without other words, this makes him tenant for life. (o) So a grant by a tenant in fee at large, or for a term of life generally, shall be construed to be an estate for the life of the grantee, and not for the life of the grantor or other person; because an estate for a man's own life is in legal contemplation more beneficial and of a higher nature than for any other life; and all grants are to be taken most strongly against the grantor, unless

Interest for life,
by what words
created.

(g) 2 Bla. C. 111, 114.

(h) As to a man and the heirs which he shall beget of his wife, see Co. Lit. 20, b.

(i) Litt. s. 31; Co. Lit. 27.

(k) Co. Lit. 9, 27.

(l) 6 Co. 17; Moor. 397; Goldsb. 139.

(m) 1 H. Bla. 447; 2 Bla. C. 115, 381, n. 15.

(n) See And. 43; 2 Bla. R. 1083; 3 T. R. 373; Doug. 321; 1 East, 259.

(o) Co. Lit. 42.

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against the king. (p) We have seen that as an estate for life is a freehold interest it cannot be created by any unsealed instrument excepting by will. (q)

Estates for life are either conventional and created by deed or will, or arise by operation of law, as tenant in tail after possibility of issue extinct, (r) tenant by the curtesy, and tenant in dower. The express words by which an estate for life is created, are, as just observed, by a general grant or devise of land to *A.* without any word denoting an intention to pass an estate of inheritance, but more generally by using the words "to have and to hold the same (meaning the property before specified) to him the said *A.* and his assigns for and during the term of his natural life;" or "for and during the life of *C. D.*;" or "for and during the lives of *C. D.*, *P. F.* and *G. H.*, and the life of the survivor or longest liver of them." The latter is a usual mode of granting an annuity, and three or more very young persons are named, so that the life of at least one of them will probably endure for a great many years, and thereby save the expense of any insurance, at least, until after the death of one or more of the persons.

Interest for
years or less,
how created.

An estate or interest for *years* might, before the statute against frauds, 29 Car. 2, c. 3, be created by mere verbal demise for any term of years, but that act declares that all parol demises for more than three years shall have at most the force and effect of a tenancy *at will*, now construed to mean from year to year, determinable by a regular notice to quit. (s) We have seen that it may, excepting when made by a tenant in tail, commence *in futuro*, in which respect it differs from a freehold interest. (t) It must be certain in duration, (u) though as *id certum est quod certum reddi potest*, a lease may be valid if made for so many years as *J. S.* shall name. (x) With respect however to its *commencement* no uncertainty would prejudice, unless it would also render its *duration* uncertain; for if no day of commencement be named the term begins from the making or delivery of the lease. (y) But as regards *duration*, it must be *certain*: thus a lease for so many *years* as *J. S.* shall live, is void from the beginning, because it is neither certain at the time, nor can ever be reduced

(p) Co. Lit. 42, 36.

(q) 8 East, 167; 5 Bar. & Cres. 221; 8 Bar. & Cres. 293.

(r) Tenant in tail after possibility, has some of the qualities of an estate tail, as to be dispunishable for waste, but for most material purposes he is only tenant

for life. See Co. Lit. 27, b.; 2 Inst. 302; 4 Coke, 63, a.; 15 Ves. 419.

(s) 8 T. R. 3; 5 T. R. 471.

(t) Ante, 244, 245; 2 Bla. C. 143, 144.

(u) Co. Lit. 45.

(x) Bac. Ab. Leases, L.; 6 Co. 35.

(y) Co. Lit. 46.

to a certainty during the continuance of the lease; (2) and it could not operate as a grant for the life of J. S. because that would be a freehold interest, which must be conveyed by feoffment and livery of seisin, or by some deed operating under the statute of uses. (a) And the same doctrine holds if a parson make a lease of his glebe for so many years as he shall continue to be parson of Dale, for this is still more uncertain. (b) So a lease to A. generally, or so long as he should please, would be void, because if he did not determine it, it would at least continue during his life, and consequently pass a freehold interest, which cannot pass by such an instrument, but only by feoffment and livery of seisin, or by deed operating under the statute of uses; and as the lessee only had the power of determining the tenancy, it could not be deemed an ordinary tenancy from year to year. (c) But a lease for twenty or more years, if J. S. shall so long live, or if he should so long continue parson, is good; (c) for then there is a certain period fixed, beyond which it cannot last, though it may determine sooner on the death of J. S., or his ceasing to be parson there. But as it is not certain how long the *cestui qui vie* will live, such a tenancy is not for a term certain within the meaning of the 1 G. 4, c. 87, in proceeding by ejectment. (d)

Leases or terms for years are of two descriptions with different objects; first, those by which lands and other tenements are demised in order to give the party the actual possession during the term, rendering a fine or an adequate annual rent; or secondly, they are mere terms created for conveyancing purposes, as for 1000 or more years, in order to secure the legal right of possession in the lessee as a trustee for some named purpose, and afterwards to attend upon and protect the inheritance, and which conveyancers are in general anxious to keep on foot. Terms for 1000 or 2000 years are in general presumed to be of this nature; (e) and these, after the uses or trusts of the terms have been satisfied, if not recognised as subsisting within twenty years, may and usually are to be presumed by a jury to have been surrendered; (f) but otherwise they will endure till

(2) Co. Lit. 45. *Quære*, if in a will, would not it operate as an estate *pur autre vie*?

(a) 8 East, 167; 5 Bar. & Cres. 221; 8 Bar. & Cres. 293.

(b) Co. Lit. 45.

(c) 8 East, 167. See *ante*, as to the necessary conveyance to pass a freehold interest.

(d) 7 B. & Cres. 2; but an agreement in writing for three months certain is a tenancy for a term certain within that act,

5 B. & A. 766; 1 Dowl. & R. 433, S. C.; and see 2 B. & Adolp. 922.

(e) Cowp. 595.

(f) 2 B. & Ald. 710, 782; 1 Car. & P. 524, 526. The presumption of a surrender is only to be in favour of the party who proves himself to be *beneficially* entitled, and not *against* such party, 6 Bing. 174. As to presumptions of a surrender in general, Sugd. V. & P. 407 to 448; *post*, Surrender.

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expired by effluxion of time; and the term must in conveyances, and in actions of ejectment, be traced to its legal owner, who alone is the proper party to recover at law. (*g*)

A term for years in an incorporeal hereditament (as a several fishery in a navigable year, which is an incorporeal and not a territorial hereditament,) cannot be created without deed. (*h*) In order to perfect a lease and an estate for years the lessee should enter, and in pleading a title against a stranger, such entry should be averred, for without entry the lessee has only an *interesse termini*. (*i*) In pleading a term for years as a perfect interest in an estate, so as to give the lessee a preferable right to a subsequent lessee or stranger, the entry of the lessee must be averred, or it must be shown that the lessee elected that the deed should enure by way of bargain and sale to pass the estate. (*k*)

Tenancy from year to year, or less, by what words created.

A tenancy from year to year may be created by express words, or by implication or inference from the mere letting a person into possession as a tenant. The description of such a tenancy is "that the landlord demised the premises to the tenant to hold the same from the — day of — for and during the term of one year, and so on from year to year, so long as the said landlord and the said tenant should respectively please." But such a tenancy cannot, as we have just observed, (*l*) be created by word or unsealed demise from year to year determinable only at the option of the tenant, for that would create a freehold for his life, determinable sooner at his option without deed, which is contrary to law. (*m*). An agreement or covenant to grant a lease is prospective, and not a lease or demise, but merely a stipulation to grant a lease, (*n*) unless the instrument also contain words of *immediate demise*, when it will amount to a *demise*, although there be a stipulation thereafter to grant a more formal lease; (*o*) but whether an instrument shall operate as a formal lease or only as an agreement for a future lease will depend on the intention of the parties, to be collected from the instrument itself; (*p*) and if an agreement be in the usual form, that *A.* agrees to let to *B.*, or agrees that *B.* shall hold and enjoy, these, without

(*g*) 7 T. R. 47.

(*h*) *Duke of Somerset v. Fogwell*, 5 B. & Cres. 875.

(*i*) 2 Bla. C. 144; *Tho. Co. Lit. Index, Interesse Termini*; 8 Bing. 92; 5 B. & Cres. 114

(*k*) *Miller v. Green*, 8 Bing. 92.

(*l*) *Ante*, 253.

(*m*) 8 East, 167.

(*n*) See note (*p*) *infra*.

(*o*) 8 Bing. 178; 7 Id. 590; 6 Id. 206, and cases there cited.

(*p*) 3 Taunt. 65; 5 T. R. 163; 13 East, 18; 5 Bar. & Ald. 322; 6 East, 530; 3 Dowl. & Ry. 522; 5 Bar. & Cr. 41; 8 Bing. 178.

other qualifying words, operate as an immediate demise. (q) The distinction is important in many respects; for where the instrument operates as an immediate *demise*, the landlord may distrain even for the first quarter's rent; but if it were merely a prospective agreement, no distress could be supported (r) until, by a long holding or by payment of rent, a collateral tenancy from year to year could be inferred, (s) for a *distress* can only be made where a party holds under a *demise* express or implied. (t). A lease or demise for one year, and so on for two or three years as the parties shall agree, has been holden to be absolutely binding on both parties for two years at least, and not determinable by any notice before the end of the second year; (u) but that doctrine has been qualified; and in the case of lodgings taken generally at so much per annum, payable half-yearly, a tenancy only for a year will arise, and not a tenancy from year to year, so that he may quit at the expiration of the first year without any notice to quit. (v) Under an agreement that the tenant should always be subject to quit at three months' notice, he is not tenant from year to year, but from quarter to quarter. (w) And where the taking is at so much per week or month, the tenancy is to be considered as weekly or monthly, determinable by a week's or a month's notice; (x) or by what is termed a *current* notice, as by a notice to a weekly tenant to quit at the end of his tenancy next after one week from the date or the time of his being served: (y) but if it require him to quit on a particular day of the week, that must be the very proper day, viz. the day before that on which the tenancy originally commenced. (z) A notice served on the 28th of September to quit on the ensuing 25th of March is a sufficient half-year's notice to quit, (a) and even if served on the 29th of September, it would suffice, though the tenant were absent, and did not return till a subsequent day. (b) It has been recently determined that a demise by a person who is tenant from year to year to a sub-tenant also to hold from year to year is, in legal operation, a demise from year to year *only during the continuance* of the first tenancy, and may properly be so described in pleading, although at the time of making the second demise no such qualification was mentioned, and consequently that when the first tenancy expires, the second also

(q) 1 T. R. 735; 5 Id. 163; 8 Bing. 182, 183; Vin. Ab. License.

(r) 2 Taunt. 148; 5 Bar. & Ald. 322.

(s) *Munn v. Lovejoy*, 1 R. & M. 355; 13 East.

(t) 2 B. & C. 478.

(u) 1 Wils. 262.

(v) 3 Bar. & Cres. 90.

(w) 5 Camp. 510; and see as to lodgings, 1 T. R. 162; 1 Esp. 94; *Adams's Eject.* 124; 3 Bar. & Cres. 90.

(x) 6 Bing. 362.

(y) 5 Car. & P. 67; 1 Mood. & M. 10.

(z) 6 Bing. 574; 4 Moore & P. 391, S. C.

(a) 1 Mood. & Malk. 10.

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determines. (b) A tenancy from year to year is considered in law as a tenancy for the residue of a certain term of years, and may be so stated in pleading. (c) Such a tenant, who, after having given notice to quit, holds over for a year, and is liable therefore to pay double rent, according to the 11 Geo. 2, c. 19, may quit at the end of such year without fresh notice, because, by the terms of that act, he is only liable to pay double rent so long as he continues in possession, and he does not, under that act, become a fresh tenant from year to year. (d) As a tenancy from year to year is capable of enduring for an indefinite time, unless determined by consent, it has been held that such a tenant may grant a lease for twenty-one years, and that his executor may sustain an action for the breach of a covenant in such lease committed after the death of the lessor, (e) and he has sufficient reversion to enable him to distrain upon his under-tenant. (f)

Tenancies strictly at will or sufferance, how created.

Although when a person is let into possession as a tenant the inference now is, that he is a tenant from year to year, until the contrary be proved; (g) yet that inference may be rebutted. And though such uncertain tenancies but rarely exist, it must by no means be understood that a *strict tenancy* at will, or at sufferance, cannot exist at the present day, for it may clearly be created by the express agreement of the parties. (h) Thus, where a party let a shed to another expressly for so long as both parties should like, on an agreement that the tenant should convert it into a stable, and the defendant should have all the dung for a compensation, and there was no reservation referable to any aliquot part of a year, this was construed to be an estate strictly at will. (i) So where the owner said, "I give you such a close to enjoy as long as I please, and to take again when I please, and you shall pay nothing for it," it was held that these words created a tenancy strictly at will. (j) Where a gamekeeper or other official person has been let into a messuage, buildings, or land, merely as an incident to his office, and without his paying rent, his right to occupy ceases upon his being discharged from such office, and if after demand he retain possession, he may be immediately evicted, or an ejectment sustained. (k)

(b) *Pike v. Eyre & ors.* 9 Bar. & Cres. 909. See *Id.* as to the effect of the first tenant surrendering his tenancy.

(c) 1 Campb. 317.

(d) *Booth v. Macfarlane*, 1 B. & Adol. 904.

(e) *Mackay v. Mackreth*, 2 Chit. Rep. 461, 475.

(f) 1 Mood. & Malk. 493.

(g) 3 Burr. 1609; 1 T. R. 163; 3 T. R. 16; 5 T. R. 471; 8 T. R. 3; 3 East, 451.

(h) 4 Taunt. 128; 5 Bar. & Ald. 604; 1 Dow. & Ry. 272.

(i) 4 Taunt. 128.

(j) Cald. 569.

(k) Moore, 8; Lit. Rep. 139; 16 East, 33.

Where a party enters as tenant under a lease which is void, or is let into possession under an agreement for a lease, he becomes tenant at will, until possession for a year, and payment of rent, and after such possession and payment of rent, he would now be considered as tenant from year to year, (*l*) though it was formerly held, that even after payment of rent he was a mere tenant at will. (*m*.)

A tenant *at sufferance* is an occupier who at first came in by lawful demise, and after his estate ended, continueth in possession, and wrongfully holds over; (*n*) as if a tenant under a lease hold over after it has determined, or tenant *pur autre vie* after the death of the *cestui que vie*; and in other cases, where a person comes into possession of a particular estate by the act of the party, and holds over, he is tenant at sufferance. (*n*)

By the act of 4 Geo. 2, c. 28, s. 1, it is enacted, "That where any tenant holds over after the demand made, and notice in writing given by the *landlord*, for delivering the possession, such person so holding over shall pay double the yearly value of the lands so detained, for so long time as the same are detained, to be recovered by action of debt, against the recovering of which penalty there shall be no relief in equity." But that act applies only to cases in which the *landlord* gives notice to quit. As to those cases where the *tenant* gives notice, it is, by the 11 Geo. 2, c. 19, s. 18, enacted "That in case any tenant or tenants shall give notice of his, her, or their intention to quit the premises by him, her or them holden, at a time mentioned in such notice, and shall not accordingly deliver up the possession thereof at the time in such notice contained, that then the said tenant or tenants, his, her, or their executors or administrators, shall from thenceforward pay to the landlord, or landlord's lessor or lessors, double the rent or sum which he, she, or they should otherwise have paid." This act applies as well to parol demises from year to year, as to leases in which there is a power to determine the term, (*o*) but it only operates where the notice to quit is valid, not where it is invalid. (*p*)

Where a mortgagee suffers the mortgagor to remain in possession of the mortgaged premises, without any agreement as to tenancy, or other continuing terms of occupation, the mortgagor is not tenant at will to the former, but only *quasi* tenant at will,

Mortgagee and
mortgagor.

(*l*) 3 B. & C. 483; 2 Taunt. 148; 7 Bing. 451; 5 B. & Ald. 322; 1 Ry. & M. 355; 3 Bing. 361; 2 M. & P. 281; 5 Bing. 185; S. C. 8 T. R. 3.

(*m*) See 1 Wils. 176; Brownl. 30;

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(*n*) Co. Lit. 57, b. The landlord may sue him in case for waste. 1 Campb. 360.

(*o*) 1 Bla. Rep. 530; 3 Burr. 1603.

(*p*) 7 D. & R. 411; 4 B. & C. 922.

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or at most tenant by sufferance only, and it should seem not even the latter, because he may be treated either as tenant or trespasser, at the election of the mortgagee; and in ejectment by mortgagee against mortgagor it is not necessary to demand possession before action brought, and consequently under such circumstances the mortgagor is a mere trespasser.^(q) But it has been held that an action for diverting a watercourse may be maintained against a third person by a mortgagor in possession as tenant of the mortgagee.^(r)

If a mortgagee accept rent from a tenant in possession he could not afterwards maintain ejectment without some notice to quit, for by the receipt of rent, which amounts virtually to an attornment, the mortgagee acknowledges him as his tenant.^(s)

The several incidents of these different degrees of interest.

We have mentioned one general *incident*, that of the right to alienate to the extent of the party's interest, or for a part of it; we will now notice a few other incidents. A person seised of an estate of inheritance in land of freehold tenure (otherwise than as a trustee ^(t)) may cut timber, and with impunity commit any waste or destruction, on his own land, or pull down, or burn, or commit any waste to his own house, provided it do not injure nor can be intended to injure any insurers or other persons, or to extend to the buildings or property of others, but if it do he is capitally punishable.^(u) So if he wilfully set fire to his own woods, so as to injure his neighbour's, he would also be punishable; ^(x) nor can a person legally place poisoned ingredients on his own land, or in water on his land, with intent to poison any game or poison fish.^(y) There is also a common law maxim, *sic uteri tecum ut alienum non lædas*, so that if a person place a glandered horse in his stable so near to that of a neighbour that the infection passes through and infects the neighbour's horses, the latter may sue the former; ^(z) and a person cannot legally, on his own land, obstruct or divert a watercourse

(q) 1 T. R. 582; 8 B. & Crés. 766; 5 Bing. 421; 2 Moore & P. 749; *semble*, that there is not such election in a mortgagee as to enable him to sue the mortgagor for use and occupation; see also 5 Bing. 426; 7 Id. 322.

(r) 5 B. & Ald. 604.

(s) 7 Bing. 322; see 3 East, 450.

(t) 1 Mad. Ch. Pr. 120; For. 6. At law, a *trustee* having a legal estate of inheritance cannot be sued for waste, but a Court of Equity will restrain him; 2 Ch. Cases, 32; 3 Wood. Vin. L. 399; so a

mortgagee may be restrained, Ambl. 105; 3 Atk. 210, 723; an *annuitant* when, 2 Sim. & Stu. 96.

(u) 7 & 8 Geo. 4, c. 30, s. 2; Burn's J. Burning, 1.; R. & M. C. C. 182; *ante*, 230.

(x) See other injuries, Burn's J. Malicious Injuries to Property.

(y) 2 & 3 W. 4, c. 32; and as to poisoning fish, 7 & 8 Geo. 4, c. 30, s. 15; injuring banks of rivers, &c. Id. 12.

(z) Bul. N. Pr.

which of right should flow into his neighbour's ground; and if he do, the latter may enter and remove the obstruction, or sustain an action for the consequential injury. (a) So in the case of an ancient established decoy, a person could not legally shoot, though on his own land, so near as to frighten away the wild fowl resorting thereto. (b) But in general, however wanton and injurious an injury may be, yet if it be confined in intent as well as consequences to the land of the wrong-doer, it is punishable, (c) unless the owner of the inheritance be a trustee, and then a Court of Equity will restrain him from doing any act materially injurious to *cestui que trust*. (d)

The same incidents attend an *estate tail*, for the owner may with impunity commit waste on the estate tail by felling timber-trees, pulling down houses or the like; (e) and where an infant tenant in tail, not likely to live till of age, by his guardian cut down a great quantity of timber, an injunction was refused on behalf of a remainder-man to restrain him. (f)

Of each of these estates of inheritance the wife, if she survive her husband, is entitled to *dower*; and if the husband was actually seised of his wife's estate in fee simple, or fee tail, and a child were born alive, he is entitled to the estate during his life, as tenant by the curtesy. And all estates tail are liable to be barred or destroyed by a fine, by a common recovery, or by a lincal warranty, descending with assets to the heir. (g)

A *copyholder*, though he has an estate of inheritance, cannot without special custom cut timber for sale or otherwise than for repairs, or permit dilapidations, (h) or commit other waste, and if he do, he will forfeit his estate to the lord; (i) whilst, on the other hand, the lord cannot cut trees on the copyhold unless sanctioned by particular custom, and if he do so or dig mines, the copyholder may sue him in trespass. (j)

The owner of an estate for *life*, whether for his own life or for the life of another or of others, is entitled, unless expressly restrained by the terms of the conveyance or devise, to *reasonable estovers* or *boles*, that is, *necessary* wood, such as house-

House and
other boles.

(a) 2 Smith, 9; 3 B. & Adolph. 304.

(b) 11 East, 574; 2 B. & C. 934; ante, 188, 189.

(c) Burn's J. Burning. In France the law renders it penal for the owner of land to suffer it to become so foul with weeds as to become injurious to his neighbour, by the seed of weeds being carried to a distance, a regulation which it would be well to adopt in this country.

(d) 1 Mad. Ch. R. 120; 3 Tho. Co. Lit. 243, note M.

(e) Co. Lit. 224.

(f) Saville's case, For. 6; 3 Tho. Co. Lit. 243, note M.

(g) 2 Bla. C. 115.

(h) *Permissive* waste in neglecting to repair, is cause of forfeiture. Tho. Co. Lit.

(i) Ante, 232 to 237; 2 B & Adol. 437.

(j) 4 Maule & S. 340; 10 East, 189; 13 Ves. 236; Co. Lit. 60, b. note 4; 1 Tho. Co. Lit. 657, note C.; 2 B. & Adolp. 437.

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bote, plough-bote, and cart-bote, and hay-bote, or hedge-bote. *House-bote* is a sufficient allowance of wood from off the estate to repair or burn in the house, and sometimes termed fire-bote; plough-bote, and cart-bote, are wood to be employed in making and repairing all instruments of husbandry; and hay-bote, or hedge-bote, is wood for repairing of hays, hedges or fences.^(k) But a tenant for life, unless by the terms of the grant or demise he hold the estate *dispunishable for waste*, cannot legally cut timber, though at maturity and becoming decayed, otherwise than for such purposes of repair, and not for sale, nor can he commit any other waste;^(l) and if he do he may be restrained by writ of injunction in a Court of Equity,^(m) or may be sued by the remainder-man or reversioner by writ of waste; or, now more commonly, by action on the case,⁽ⁿ⁾ and he would forfeit the place wasted.^(o) But the Court of Chancery will permit the timber growing on an estate, whereof a person is tenant for life, to be cut down when in a state of decay for the benefit of the persons entitled to the inheritance, so as no damage be done to the tenant for life;^(p) and so that court *will allow timber* to be cut down for the purpose of paying legacies charged on the inheritance.^(q) But a tenant in tail after possibility of issue extinct, and tenants by statute, recognizance, and elegit, constitute exceptions to this rule;^(r) though each may be restrained from committing malicious, wanton, or extravagant waste, or cutting ornamental timber, by injunction from a Court of Equity,^(s) the clause, "without impeachment of waste," never being extended in a Court of Equity to allow the very destruction of the estate itself, but only to excuse mere permissive waste;^(t) and although by the terms of the grant or devise a tenant for life be declared *dispunishable for waste*, yet he may be restrained by injunction from what is termed *equitable* or malicious waste, and from making any spoil or destruction upon the estate, and from pulling down the family mansion, or cutting down avenues and ornamental timber in pleasure grounds, and young trees not fit for timber, and even trees upon a common, though two miles from the mansion-house, but which had been planted as an orna-

(k) 2 Bla. C. 35; Co. Lit. 41, 54, b.; 3 Tho. Co. Lit. 238, 239.

(l) Co. Lit. 53; 2 Bla. C. 283, 284; Stat. Gloucester, 6 Ed. 1, c. 5; and see a valuable note 3 Tho. Co. Lit. 241, note M.

(m) *Post*, chap. viii.

(n) 2 Saund. 252; 1 Saund. 525; 2 Bing. R. 262.

(o) 2 Bla. C. 283, 284; 3 Bla. C. 229.

(p) 2 P. W. 240.

(q) 2 Vern. 152.

(r) Co. Lit. 27, 54; 2 Rol. Ab. 826, 828; 2 Bla. C. 283, 284.

(s) See 2 Bla. C. 125, note 8.

(t) 1 Mad. Ch. Fr. 115; 3 Tho. Co. Lit. 243, note M.

ment to the estate; and in the case of the mansion-house such a tenant may be ordered to repair the damage he has committed. (u)

The executors of every tenant for life, whose estate determines by his own death or that of others, and not by his own fault or act, are entitled to *emblements*, or crops produced by cultivation, and in progress towards maturity, before the determination of the estate. (x) This protection to persons, the duration of whose interests was uncertain, was extended to an incumbent, who, by 28 II. 8, c. 11, was enabled to bequeath by will the corn and grain growing upon the glebe land, manured and sown at his own cost, but for the above reason a parson who determines his own estate by resigning his living is not entitled to emblements. (y)

The incidents of a tenancy for *years*, in the absence of any stipulation, are, that *he* (the tenant) is entitled to the same *estovers* as a tenant for life, namely, to house-bote, fire-bote, plough and cart-bote, and hay-bote, and wood to repair or burn in the house, to make and repair all implements of husbandry, and for repairing hedges and fences; (z) and when a tenant for years is legally bound to repair, even at his own charge, or at liberty to repair, he may cut timber trees for repairs, even without the assignment of his landlord, unless they be excepted in the demise, or he be otherwise expressly restrained; (a) and unless trees be excepted, or there be an express power reserved, the lessor would be a trespasser in entering to cut trees. (b) But when trees are excepted in the lease, the lessor may sue the lessee in trespass, if he either fell or damage them, (c) and the lessor may then enter the demised lands in order to fell and take away the trees. (d) If not excepted, the trees, instantly they have been blown down or severed, become the property of the lessor, and if taken by the tenant or a stranger, the lessor may sue in trespass or trover. (e)

With respect to *emblements*, as the tenancy is to determine at a fixed time, if the lease be silent, and there be no custom of the country, the lessee cannot, after the expiration of his

(u) 2 Vern. 733; 1 Bro. 196; 3 Bro. 549; 6 Ves. J. 107; and see in general 3 Woodes. 399, and *post*, chap. viii.

(x) Com. Dig. Biens, G. 1, 2; Vin. Ab. Emblements, H. 3; Bac. Ab. Executors, H. 3; Co. Lit. 55, a; 2 Bla. C. 122, note 4; as to *emblements* in general, *ante*, 91, 94, and 161.

(y) 2 Bar. & Ald. 470.

(z) 2 Bla. C. 144; 1 Tho. Co. Lit.

624.

(a) 1 Tho. Co. Lit. 624; 3 Id. 237 to 239; Mo. 23.

(b) 1 Tho. Co. Lit. 238, note I.; 1 Saund. 322, n. (5).

(c) Id. *ibid.*; 1 Lord Raym. 552.

(d) Cro. Eliz. 18.

(e) 7 T. R. 13; 3 Tho. Co. Lit. 246, note Q.; Mo. 23; 1 Saund. Rep. 322, and Id., Index, Trees.

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tenancy, enter to sever or carry away crops improvidently sown so late as not to be cleared during the tenancy. (*f*)

A tenant *from year to year* is not liable to general repairs, or to keep them in what is termed tenantable condition or repair; he is only bound to use the premises in tenant-like manner, but no further; he is not bound to rebuild, in case of damage by fire. (*g*) But, on the other hand, no tenant has, even in a Court of Equity, any right to require a landlord to expend money he has received from an insurance-office, or to restrain him from suing for rent of the premises when destroyed by fire. (*h*)

The incidents of *all tenancies*, even of the lowest, and whether of freehold or copyhold land, are, that without an express exception, although the *property* in mines and trees remains in the owner of the fee, yet the *possession* of the whole of the subsoil and every thing upwards is vested in the tenant, so that, although he cannot legally dig mines, or cut trees, except for repairs, yet he has an interest in their continuance, and may therefore sue even his lessor for digging mines, or cutting trees. (*i*) A tenant strictly *at will* or *sufferance* is equally entitled to some descriptions of *estovers* or *botes* as a tenant for a term of years, but as he is not bound to make substantial repairs, he could not, perhaps, legally cut timber for the purpose of repairs. It is said, that if the landlord enter and cut timber, that is of itself a determination of the will, for otherwise he would be a trespasser. (*k*) Each of these descriptions of tenants is entitled to *emblements*, when the landlord determines the tenancy, but not so if it be determined by his own act. (*l*)

Right of voting
for members of
parliament, in
respect of the
beforementio-
ned different in-
terests.
Freeholds of in-
heritance.

The old franchise or right of voting, which *freeholders* of inheritance, of the annual value of forty shillings, formerly possessed, (*m*) is still reserved to them by the recent reform act. (*n*) But, in order that a party may be entitled to vote, he must be registered according to the provisions of that act, and, in order to this, he must have been in the actual possession, or in the receipt of the rents and profits for his own use, (*o*)

(*f*) 1 Tho. Co. Lit. 633; 2 Bla. C. 144, 145; as to emblements, *ante*, 91, 94, 161.

(*g*) *Per* Gibbs, Holt, C. N. P. 9; 1 Marshall's R. 567.

(*h*) 1 Simon's R. 146; when otherwise, under the building act, within the bills of mortality, 5 B. & Ald. 1.

(*i*) *Lewis v. Branthwaite*, 2 B. & Adolp. 437.

(*k*) Co. Lit. 55; and 2 B. & Adolp. 438.

(*l*) 10 Bar. & Cres. 720; *ante*, 94; 2 Bla. C. 146, 147.

(*m*) 8 Hen. 6, c. 7; 10 Hen. 6, c. 2; 7 & 8 W. 3, c. 7, s. 3; Id. 24; 10 Anne, c. 23, s. 3; 18 Geo. 2, c. 18, s. 1; 3 Geo. 3, c. 24; 14 Geo. 3, c. 58; 20 Geo. 3, c. 17; 53 Geo. 3, c. 49; and see 1 Bla. Com. 172 to 175.

(*n*) 2 Wm. 4, c. 45, s. 75.

(*o*) Therefore bare trustees and mortgagees not in possession cannot vote, s. 23. But the interest of a mortgagee, which reduced the beneficial value under 40s., took away the mortgagor's right to vote, 2 Lud. 467. But see 2 W. 4, c. 45, s. 23.

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for six months previous to the 31st day of July next preceding each annual registration, unless where the party became entitled by descent, marriage, marriage-settlement, or devise, at any time within such period of six months. (*p*) Such annual value must, however, be over and above all charges and incumbrances, but not including any public or parliamentary tax, nor any church rate, county rate, or parochial rate. (*q*) But no freehold house or building which is situated in a borough will give a right to vote for a county, if in the occupation of the owner, if it be of sufficient annual value (that is, 10*l.* per annum) to give a vote for the borough; (*r*) but it is otherwise, if it be in the occupation of a tenant.

Copyholds of inheritance (though formerly not giving any vote (*s*)), if of the clear annual value of 10*l.*, also confer a right of voting for county members, under the same restrictions as freeholds. (*t*) But a copyhold house or building, situate in a borough, will not, if of sufficient value to give a borough vote, confer a county vote, whether in the occupation of the owner or tenant. (*u*)

Copyholds of inheritance.

As to the right of voting in *boroughs*, it may be here stated generally, that, independent of the old rights of voting in scot and lot boroughs and corporation boroughs, the reform act confers a right of voting upon all occupiers, either as owner or tenant of any house or building of the clear annual value, either alone or with land, of 10*l.*, provided the party has been in occupation for twelve months before the 31st day of July preceding the registration, has resided for six months previous within the borough, or seven miles from the same, has been rated to the poor during all the time of occupation, and has paid, before the 20th day of July preceding, all rates and assessed taxes up to the 6th day of April preceding. (*x*) The receipt of parochial relief forms a disqualification in a borough, but that provision does not extend to a county voter. (*y*)

Right of voting in boroughs.

The old right of voting is reserved to freeholders *for life* of forty shillings clear annual value, who were seised at the time of the passing of the reform act. (*z*) But this act requires, as to freeholders for life who become entitled after the passing of that act, that their estate should be of the clear annual value of 10*l.*, (*a*) and in the actual occupation of the

Freeholds for life.

(*p*) 2 Wm. 4, c. 45, s. 26.

(*q*) Id. s. 21, and see *ante*, 262, n. (*a*).

(*r*) Id. s. 24.

(*s*) *Ante*, 30 Geo. 3, c. 35.

(*t*) 2 Wm. 4, c. 45, s. 19.

(*u*) Sect. 25.

(*x*) Sect. 27.

(*y*) Sect. 36.

(*z*) Sect. 18.

(*a*) Id.

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Leaseholds.

owner, unless his title accrued by marriage, &c. The same restrictions as to registration are required as in the case of freeholds of inheritance.

Mere occupiers
at 50*l.* per an-
num rent.

The owners of leases (not being underleases) originally granted for sixty years, of the clear yearly value of not less than 10*l.*; for twenty years of not less than 50*l.* are entitled to be registered as voters for county members, whether in the actual occupation themselves, or having let to others; and so also are under-lessees for similar terms and like value, if they be themselves in the actual occupation. (*b*) So also persons actually occupying as tenants from year to year only, or otherwise, any premises for which they are *bonâ fide* liable to a yearly rent of not less than 50*l.* are entitled to vote, having been previously registered. But in order that such lessees or occupiers may be entitled to be registered, they must have been in actual possession, or in receipt of the rents as above for their own use, for twelve months before the 31st day of July preceding the term of registration, unless they became entitled by succession, marriage, marriage-settlement, or devise.

In county votes there is no necessity that the party should have been *rated*, or have paid rates or taxes; nor in any case is it now requisite that the property should be assessed to the land tax. (*c*)

IV. TIME OF
ENJOYMENT, as
whether in pos-
session, re-
mainder or
reversion.

The *times of enjoyment* of real property (the fourth subdivision (*d*) of the subject of real property) are estates or interests in *possession* or in expectancy, as a *remainder* or *reversion*; the first, when the owner has an *immediate* estate in *possession* or right of possession, and entitled to the actual permanency of the profits; the *second*, some estate or interest immediately to *remain* and to follow the former particular estate when it has ceased, and which must be created *by act* of a donor, grantor or testator, together with such particular estate at the same time; and the last being a *reversion* (from *revert*o), is the *residue* of an estate left in the grantor, to return to him in possession after the determination of some particular estate granted out by him or by some former owner of the property. (*e*) In other words, an estate *in possession* gives a present right of

(*b*) 2 Wm. 4, c. 45, s. 20.

(*c*) 1*d.* s. 22.

(*d*) See general division of subject, *ante*,

145, 147. And see in general 2 Bla. Com. 163 to 179.

(*e*) 2 Bla. Com. 175, 176.

immediate enjoyment. An estate *in remainder* gives a right of future enjoyment, whether certainly or contingently, depends on the form of the gift; and when the interest is contingent in the limitations, then on the events which shall take place. An estate *in reversion* gives a present fixed right of future enjoyment. (f) The subjects of remainders, and reversions, and executory devises, are parts of the most abstruse branches of the law to be studied by conveyancers, and we can here only notice a few points of practical utility.

Almost every kind of real property, whether corporeal or incorporeal, and even personalty, may in general be so granted, leased or devised, as to create an interest in possession, remainder or reversion. But a judicial office is in general an exception. (g) An estate in remainder, or reversion, or any estate of *freehold*, could not at common law commence *in futuro*; and there must be an intervening estate to support the remainder or reversion. (h) But by a conveyance under the statute of uses there may be a grant of a freehold to commence *in futuro*, and in the mean time the interest undisposed of will be a resulting use. (i)

Some of the distinguishing *incidents* of these rights are, that only the party *in possession* is entitled to the enjoyment of the privileges incident to the right to the property; and that he alone, and not a remainder-man or reversioner, can vote at an election; nor were the latter under the now repealed law qualified to kill game; (k) nor is a remainder-man or reversioner entitled to interfere with the property until his right comes into possession, excepting that he in general may apply to a Court of Equity for an injunction to stay waste. (l) Each however is entitled to immediate possession upon discovery that the tenant for life has forfeited his interest by illegal alienation for more than his interest, or for breach of other conditions expressed in a lease &c., or implied, as in the case of general waste. In cases also of an intervening tenancy for life, the remainder-man

(f) 1 Prest. on Estates, 89, &c. And see in general as to estates in *possession*, 2 Cruise, Dig. 258, id. 6 vol. index tit. Possession. As to estates in *remainder*, 2 Cruise, Dig. 258, id. 6 vol. index Remainder. 2 Saunder's Rep. index Remainder and Contingent Remainder. And as to *reversions*, 2 Cruise, Dig. 454, id. 6 vol. index Reversion; 2 Saunder's Rep. index Reversion; 1 Prest. on Estate, 89, &c. And as to *executory devises*, see 3 Saunder's, index, that title.

(g) 11 Coke, 2, 4, a; 1 Tho. Co. Lit. 236, note 12, &c. where see some exceptions enumerated.

(h) 2 Bla. Com. 143, 144, 164, 165.

(i) 1 Sand. U. & T. 128; 2 Id. 7.

(k) The statute 22 & 23 Car. 2. c. 25, s. 3, exempted from penalties for killing game persons "*having lands and tenements, &c.*," and which words were construed to mean having the same in possession and not in *reversion*. *Mullock v. Eastley*, 7 Mod. 482.

(l) 3 Tho. Co. Lit. 242 to 245, note 27.

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may by proceeding under stat. 6 Ann. c. 18, once a year ascertain whether the tenant for life is still in existence; and a remainder-man or reversioner may, like any owner in possession, alienate or devise his already vested interest, though prospective in enjoyment. (*m*)

It is a rule that very *general* words in a deed or devise will transfer a reversion in any estate the grantor or testator may have, though not particularly named in the deed or will; as by the words "and the reversion, remainder, rents, &c." unless it be qualified by some special subsequent words. (*n*) But a reversion, even after the expiration of a tenancy from year to year, can only be conveyed by deed. (*o*) Another incident of a reversion in fee is, that it is assets to pay the specialty debts of the ancestor from whom the lands immediately descended. (*p*) And that when the owner of a particular estate, as for life, is also the owner of the reversion, there being no intermediate estate, the former merges in the latter. (*q*). A slight recognition of a tenancy under a void lease by a remainder-man, after the death of the tenant for life, renders the occupier tenant from year to year. (*r*)

Injuries and
remedies, in
case of.

As regards *civil injuries and remedies*, they very much depend on the question, whether the right to the property affected was in possession, or in remainder, or reversion. If to property in possession, the owner's remedy is trespass or ejectment for an immediate injury committed with actual or supposed force; but if the right were in remainder or reversion, the remedy for the same injuries would be an action on the case; and then only when the act complained of really occasioned an injury of such a continuing nature, as actually or probably to prejudice the future enjoyment when it may be supposed it will come into actual possession. When an injury is of so durable a nature as if continued it will injure the right in remainder or reversion, then not only the party in possession may bring his action for the immediate injury to his possessory interest, but the reversioner may also sue for the injury to his

(*m*) But a reversioner, even after a tenancy from year to year, can only convey his interest by deed. *Brawley v. Wade*, M'Clel. Rep. 664.

(*n*) *Shep. Touchstone*, 88; 1 B. & Adol. 593; Lut. 761; 1 Ld. Raym. 187; 2 Ves. 48.

(*o*) M'Clel. Rep. 664.

(*p*) 2 Tho. Co. Lit. 152, note R.; 2

Saund. 8, f. n. 4; 3 Bos. & Pul. 643 to 651.

(*q*) *Id.*; 5 Bar. & Cres. 120; 2 Bla. Com. 177, 178, *aliter* as to an *interesse termini*, unless the estate for years comes into possession of the owner of the estate for life. 5 B. & C. 111.

(*r*) 1 B. & Adol. 365.

interest; (s) and this, although the injury *might* by removal, even in the course of three days, cease to endure, for there is a present injury to the *right*; and if a reversioner were to be prevented from bringing his action during the existence of the particular estate, the testimony of the witnesses who could speak to the right might be lost; and therefore, in the case of an ancient window, a reversioner may maintain an action for an obstruction or nuisance, although the same produce no present injury to his reversion beyond that to the right, and which may be removed before the reversioner comes into possession. (t) So both the tenant in possession and the reversioner may respectively sue the hundred for damages to their respective interests, by a riotous and felonious destruction of houses and other named buildings; (u) and where there has been a repetition of such a continuing injury, a reversioner may proceed in several fresh successive actions for each repetition. (x) But the injury must be of such a permanent nature as at least will, in the opinion of a jury, occasion some prejudice, injury or depreciation to the interest in remainder or reversion; as where an ancient light is obstructed by a building erected in such a manner as to constitute a permanent obstruction, in which case the tenant in possession may sue, and also the reversioner; (y) and if the injury were merely a transient trespass, as driving carts over a close, without any removal of the soil, such an injury could not well be considered as enduring so as really to injure the interest of the reversioner; and consequently, he could not sue, and the question of injury to the reversion is generally for a jury; (z) and in all actions by a remainder-man or reversioner, it must be averred and proved that the act complained of really produced some damage, though very slight evidence even of probable continuing injury would suffice. (a) In case therefore of a mere trespass, if it be essential immediately to litigate the right to commit, the proceeding must be in the name of the occupier with his concurrence. (b)

So an immediate remainder-man or reversioner, whether of

(s) 9 Bar. & Cres. 134; 4 Man. & Ry. 130, 136 Ancient lights, 4 Burr. 2141; 3 Lev. 209, 359; Com. Dig. Action, Nuisance, B.; 1 M. & S. 284; 1 Taunt. 183, 190; 1 Saund. Rep. 323, b; 2 Saund. 252, b; 3 Car. & P. 617; 2 B. & Adol. 97.
(t) 1 Mood. & M. 350; 2 B. & Adol. 97, S. C. & 3 Car. & P. 615; 4 Burr. 2141.

(u) 9 Bar. & Cres. 134; 4 Man. &

Ry. 130, 136, S. C.

(x) 2 B. & Adol. 97.

(y) Id. *ibid.*; 4 Burr. 2141; 3 Lev. 209, 359, 360.

(z) 1 M. & S. 234; 6 Bing. 379; 10 Bar. & Cres. 145.

(a) 1 M. & S. 234; 1 Taunt. 202; *semble* 2 East's R. 154; 6 Bing. 379; 10 B. & Cres. 145.

(b) 1 Chit. Pl. 5 ed. 72, 702.

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freehold or copyhold tenure, may obtain an *injunction* to prevent waste, or may sue a tenant for life (unless punishable of waste) or a stranger for illegally cutting down trees otherwise than for repairs, or for other injury committed during the particular estate for life. (c)

As regards *criminal offences* affecting a remainder or reversion, in general the offence should be laid as affecting the property of the party *in possession*, and not the remainder-man or reversioner. But to this rule there are exceptions, as between tenants and landlords, for if the former commit any injury to fixtures in the nature of larceny, the offence is punishable as such, and the latter may be described as the property of the lessor, though strictly his interest was, at the time of the offence, only in reversion. (d)

V. NUMBER OF
OWNERS, whether in severalty, coparcenery, joint tenancy, or in common. (e)

All estates or interests in every kind of corporeal and incorporeal real property, may be held either in *severalty*, *coparcenery*, *joint tenancy*, or *in common*. With respect to the modes and words by which these various interests may be created, and their properties and incidents in general, we cannot in this summary attempt to consider them in detail, but at most can notice a few incidents of most practical importance.

Parceners, &c.

One incident as to *parceners* is, that as they take by *descent*, their husbands are severally entitled to vote at an election. (f) But all conveyances or devises made to several persons, for the purpose of splitting and multiplying votes, were declared by the former acts to be void, and only one vote could be received. (g) Where, however, such purpose was not apparent, it has lately, in the proceedings under the reform act, been considered that joint tenants or tenants in common might *each* vote in respect of the same property, if of sufficient value. (h) In the case of a corporation aggregate, neither the whole nor one or more can vote in respect of an estate belonging to such corporation. (i) As to several *joint occupiers*, each of them is entitled to vote, in case the clear yearly value of the premises shall be of an amount which, when divided by the number of

(c) 3 Lev. 130; Fisher on Copyhold, 114; 2 Saund. 133, 252.

(d) 7 & 8 Geo. 4, c. 29, s. 45.

(e) See *ante* 147, as to division of the subject; and see 2 Bla. C. 179 to 195, and notes and works there referred to.

(f) 1 Bla. C. 174, note 37; Heyw. 99.

(g) 7 & 8 Wm. 3, c. 25; 53 Geo. 3, c. 49.

(h) 2 W. 4, c. 45, s. 29, *ante* 264.

(i) Heyw. Law of Elect. 71.

occupiers, shall give a sum not less than 50*l.* in counties, or 10*l.* in cities or boroughs, for each occupier. (*k*) Before the repeal of the game acts relating to qualifications, each joint tenant or tenant in common must have had an interest in the entire estate of the clear annual value of 100*l.* or neither was qualified. (*l*)

Each coparcener and tenant in common is expressly enabled to *devise* his interest, by 32 Hen. 8, c. 1, explained by 34 & 35 Hen. 8, c. 5; and if a tenant in common devise his estate, a subsequent partition will not operate as a revocation. (*m*) But a joint tenant is not within the acts, and his devise before partition would therefore be inoperative; and if a joint tenant wish to devise his share, his only course is, *first*, to sever the joint tenancy, which may be effected by a commission from the Chancellor, upon a bill filed in the nature of the common law writ of partition, or by that writ, and he must either make or republish his will after the partition. (*n*) But there are several other acts which create a severance of a joint tenancy, as a limitation (by deed) to a stranger, or mortgage or lease for life by one joint tenant, or any act which destroys either the unity of interest, of title, or of possession. (*o*)

As respects *actions and suits*, *parceners* make but one heir, on which account, in case of copyhold, it should seem that upon admission, they are only liable to pay one set of fees. (*p*) Like joint tenants, before partition, they must jointly sue and jointly avow, (*q*) and if one sister distrain, she should avow in her own right, and also as bailiff to her other sister for the entire rent. (*r*) We have seen that in the case of an *advowson*, where the *parceners* cannot agree to present jointly, the eldest sister is first to present, and then her sister. (*s*) Partition is best effected by a bill in Chancery. (*t*)

Joint tenants must sue and be sued *jointly*, (*u*) and they must join in an avowry. (*x*) But one joint tenant may, without the consent of his co-tenant, distrain for rent due to all the joint tenants; and in general, if a party have an interest to entitle him to distrain, the averment of his having acted as

(*k*) 2 W. 4, c. 45, s. 29.

(*l*) 7 Mod. 482; Cald. 230.

(*m*) 3 P. Wms. 169.

(*n*) 3 Burr. 1488; Amb. 617.

(*o*) See 2 Cru. Dig. 500, &c.

(*p*) 3 Bar. & Cres. 173.

(*q*) 1 Tho. Co. Lit. 770, note, 778; 1 Ld. Raym. 64.

(*r*) Carth. 364; Bac. Ab. Joint Tenant,

K., Replevin, K.; *infra*, 270, note (*y*).

(*s*) Willes, 659; *ante*, 217, note (*g*); as to presentment after partition, see 7 Ann. c. 18, s. 2.

(*t*) 2 Bla. C. 189, n. 15.

(*u*) 1 Tho. Co. Lit. 736, 777 to 779, note K.

(*x*) Bac. Ab. Replevin; Carth. 328.

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bailiff is not traversable, (y) and joint tenants and tenants in common may have an account against each other, (z) though a suit in equity is frequently preferred. (a) At common law this was only so when one really appointed the other his bailiff or receiver, (b) but 4 & 5 Ann. c. 16, gives this remedy without any such appointment. (c) A notice to quit, signed by one of several joint tenants, though trustees on behalf of himself and the others, is now sufficient to determine a tenancy from year to year. (d) The prior decision, requiring the signature of *all*, turned upon the particular words in a lease, requiring a notice under *their* respective hands, and which was therefore holden to require a signature by all. (e) Joint tenants must all concur in presentation to a living, and if either one present, or they present severally, the ordinary may refuse such a presentee, and after six months may present by lapse; and the same rule holds as to tenants in common of an advowson. (f)

Tenants in com-
mon

Tenants in common being seised by *several titles* ought in *real* and *mixed* actions to sue *severally*. (g) Thus, in the mixed action of ejectment, there should be separate counts on the separate demises of each, unless they have joined in an actual lease to a third person, when the declaration may be on the demise of such lessee. (h)

But in a real or a personal action for an entire thing, as an entire rent, in respect of necessity they should join. (i) So tenants in common shall join in a *quare impedit*, because the presentation to the advowson is entire. (k) So in detinue of charters, tenants in common shall join, and if one be nonsuit the other shall recover; (k) and it is clear that if there be a *joint* lease by two tenants in common, reserving an entire rent, the two may join in an action to recover the same; but if there

(y) 4 Bing. 562; Year Book, 15 Hen. 7, 17 a. An avowry by one of several coheirs in gavelkind, and a cognizance as bailiff of the other coheir, need not aver an authority to distrain from the other coheirs, 2 Brod. & B. 465; 5 Moore, 297, S. C.

(z) 1 Tho. Co. Lit. 783, note R.; Bac. Ab. Account; Willes, 208; Selw. N. P. tit. Account; 3 Woodes. 83; 5 Taunt. 431; 2 Campb. 238; 2 Chit. Rep. 10; 3 Chit. Pl. 1297.

(a) Mad. Ch. Pr. Index, Account.

(b) 1 Tho. Co. Lit. 787, 788, note R.; 1 Leon. 219; Harg. Co. Lit. 172, a, note 8.

(c) Id. *ibid.*; Willes, 209.

(d) *Doe v. Summerson*, 1 B. & Adolph, 135; 3 Taunt. 120.

(e) Id. *ibid.*; 5 East, 491.

(f) Co. Lit. 186, b; 2 Inst. 365.

(g) 1 Tho. Co. Lit. 777.

(h) Adams's Eject. 3 ed. 209 to 211; Selwyn's N. P. 4th ed. 683; *semble* overruling 2 Wils. 232, where it is said that tenants in common cannot make a joint lease; and see 271, n. (l).

(i) Co. Lit. 196, b, 199, b; 1 Tho. Co. Lit. 777.

(k) Co. Lit. 197, b; 1 Tho. Co. Lit. 781.

be a separate reservation to each, then there must be separate actions; and if there were originally a joint letting by parol, and afterwards one of them give notice to the tenant to pay him separately, and his share be paid accordingly, this is evidence of a fresh separate demise of his share, and he must sue separately. (l) And, in general, tenants in common *may* join in a personal action for an *entire* injury to their property, as for trespass or other act which damages their tenements, as for breaking their houses or closes, feeding upon or injuring their grass, cutting their woods, fishing in their fisheries, (m) and for nuisances to their land; (n) for the damages would in case of death belong to the survivor, and it would be unreasonable, when the damage is thus entire, that several actions should be brought for the same injury. (o) And a joint action for mesne profits may be supported by several lessors of the plaintiff in ejectment after recovering therein, although upon separate demises by each. (p) They must, however, *sever* in an *avowry* for rent, for this is in the realty as in an assize, and this, though they might have joined in covenant for the same rent. (q) If sued jointly, each should avow for his own proportion, *unam medietate*, of the *whole* rent, and make cognizance as bailiff of his companion for the residue; or if sued separately, the defendant may avow only for his undivided share. (r) Tenants in common must, it is said, *join* in an *avowry* for *damage feasant*; and if one be sued, he should avow in his own right, and make cognizance as bailiff of his co-tenant. (s)

As *against each other*, tenants in common may enforce an account by action of account or bill in equity, the same as in the case of joint tenants. (t) With respect to other injuries, unless there has been an actual ouster, such as turning off cattle or wholly excluding a co-tenant from the possession of real property, he cannot sue him in ejectment, (u) nor in trespass *quare clausum fregit*. (x) But one may sue the other for cutting trees of insufficient growth, or destroying *all* the deer in a park,

(l) *Per* Abbot, C. J., 5 Bar. & Ald. 851; 4 Bar. & Cres. 157.

(m) Co. Lit. 198, a.; 1 Tho. Co. Lit. 782; 2 H. Bla. 336; 2 Bla. R. 1077.

(n) Cro. J. 231.

(o) 2 Bla. R. 1077; Bac. Ab. Joint tenants, K.

(p) 5 M. & S. 64; 2 Chit. R. 410.

(q) 4 Bar. & Cres. 157; 6 Bing. 104; 5 T. R. 246, 249; Sir W. Jones, 253; Co. Lit. 198, b; 1 Tho. Co. Lit. 784.

(r) 5 T. R. 246; Salk. 207; 2 H. Bla. 386; *semble* the authority as bailiff would

not be traversable; *ante*, 269, 270, n. (y).

(s) 2 H. Bla. 386; 5 T. R. 246; Sir W. Jones, 253; *semble* his authority as bailiff would not be traversable; *ante*, 269, 270, n. (y).

(t) *Ante*, 270, n. (z), (a).

(u) Co. Lit. 199, b; 1 Tho. Co. Lit. 784, note N.; 1 East, 563. But the tenant sued must, in consent rule, avoid admitting an ouster, 1 Campb. 173.

(x) Co. Lit. 200, a; 1 Tho. Co. Lit. 785.

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or all the pigeons in a dove-cote, or other injury amounting to destruction of the joint property, (y) or any act amounting to waste or destruction in woods or other such property. (z) It has been recently determined that the common use of a wall separating adjoining lands belonging to different owners is *primâ facie* evidence that the wall and land on which it stands belongs to the owners of those adjoining lands in equal moieties as tenants in common; (a) but that where such an ancient wall was pulled down by one of the two tenants in common, with the intention of rebuilding the same, and a new wall was built of a greater height than the old one, that act was not such a total destruction of the wall as to entitle one of the two tenants in common to maintain *trespass* against the other. (b) In a Court of Equity, between tenants in common, an injunction against *malicious* destruction may be obtained, but not against what is called equitable waste, unless the party committing the waste be insolvent, when it may be obtained. (c) But a tenant in common may obtain an injunction inhibiting waste against another, his co-tenant, who is occupying as tenant of his share. (d) But except under such circumstances, an injunction cannot be obtained between such owners. (e)

VI. Of the TITLES OR MODES of acquiring an interest in corporeal or incorporeal property.

The *titles* or *modes* of acquiring or losing the estates or interests which we have before noticed, (f) whether relating to corporeal or incorporeal things, have been generally arranged under *three principal heads*; viz. 1. *By mere possession*; (g) 2. *By descent*; (h) and 3. *By purchase*. (i) Under the last of which heads is included not only conveyances upon a *sale*, in the ordinary acceptation of the term *purchase*, but every mode of acquiring an estate *otherwise* than by descent. (j) We shall here only take a concise view of this most extensive subject, as it is probable that many improvements in conveyances, especially as respects fines and recoveries, will ere long be introduced.

(y) 8 Bar. & Cres. 257; 8 T. R. 145; Co. Lit. 200, b.; 1 Tho. Co. Lit. 787, 788, note S.; 1 Taunt. 241, 247; 4 East, 110.

(z) Id. *ibid.*; 3 Tho. Co. Lit. 244, note 26.

(a) 8 Bar. & Cres. 257.

(b) 7 Ves. 589; 3 Bro. C. C. 621.

(c) 16 Ves. 132.

(d) *Goodwin v. Spray*, 2 Dick. 667; 3 Tho. Co. Lit. 244, note 26.

(e) See divisions of subject, *ante* 147.

(f) *Ante*, 238 to 264.

(g) 2 Bla. C. 195 to 199.

(h) Id. 200 to 240.

(i) Id. 241.

(j) Id. *ibid.*; 2 Woodes. V. L. 250, 265.

It is important to be well-informed upon the subject of titles to an estate, not only to conveyancers and to those concerned at law or in equity in recovering them, but to magistrates and others as regards the right of voting, (k) or in administering the poor-laws, and deciding upon parochial settlements. (l)

In many cases, mere *priority of possession* of corporeal real property, or *long enjoyment* of incorporeal property, as of an ancient light, a way, common, &c., without any real title, is sufficient, and sometimes creates such a title even against the real owner as at least to compel him to dispute the right by a *real* action, and therefore *mere possession* has been treated as a kind of title, though of the lowest order, for it is better policy to protect a person in possession than to encourage a struggle for it by strangers, and in furtherance of that object, various statutes of limitations have been passed, which will be considered in a subsequent chapter, (n) and which, after *twenty years'* undisturbed possession or enjoyment, in general, absolutely bar or preclude the real owner from entering or maintaining an action of ejectment (which must be founded on a right of entry), or from disputing the right to the incorporeal easement in any action, unless he can bring himself within one of the exceptions in favour of infants, feme-coverts, and persons beyond sea at the time his right first accrued. (o). And under the 32 H. 8, c. 2, the mere possession of corporeal real property adversely, as if in fee-simple, and without admitting any other ownership for sixty years, is a sufficient title against all the world, and cannot be impeached by any dormant claim. (p) By these and other acts, the maxim *vigilantibus non dormientibus leges subserviunt* has been enforced and fixed within certain known limits, and those being considered as *statutes of repose*, are to be liberally and beneficially expounded in furtherance of that object. (q)

First. Mere priority of possession, or long enjoyment. (m)

(k) Reform Act, 2 & 3 W. 4, c. 45.

(l) Burn's J., Poor, Settlement by Estate, &c., 588 to 636; the reference to which will assist in many questions respecting title.

(m) See in general 2 Bla. C. 263, and post, 282, Prescription; and see cases as to parochial settlements by estate, by possession under a doubtful or incomplete title, Burn's, J., Poor, 614 to 618; and *Rex v. Butterton*, 5 T. R. 554; *Rex v. Callow*, 3 M. & S. 22; but see *Rex v. Chew Mag-na*, Burn's, J., Poor, 616.

(n) 21 Jac. 1, c. 16; Adams's Eject. 3d ed. 77, as to corporeal property; 2 & 3 W. 4, c. 71, and c. 100, as to incorporeal.

(o) 21 Jac. 1, c. 16, as to corporeal rights; and as to incorporeal, 2 & 3 W. 4, c. 71, and c. 100, as to modusses.

(p) See the exceptions, 4 Co. 11, b; 3 Bla. C. 196, n.

(q) 5 Bar. & Ald. 214; 6 Moore; *White v. Parnter*, Knapp's Rep. 226, where see the policy and reasons explained; and see post, chap. ix.

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Twenty years
possession or
enjoyment *prima facie* a sufficient title.

Even at common law, and independently of the statutes of limitation, as regards *litigation* with third persons, who cannot themselves establish any right to the real property in contest, it is seldom essential to prove the nature or extent of the interest of the party who is in possession, and who has had long priority of possession, or to show any deeds of title; for mere proof of *twenty years'* undisturbed possession of real property corporeal, or the enjoyment of real property incorporeal, or the enjoyment by a person who has not within twenty years admitted that he holds by permission, (r) is sufficient, and affords a presumption in favor of the highest or largest estate that a person could have in the subject-matter, and that he is owner in fee; (s) or in case it should appear that the land is of copyhold tenure, then the claimant has an estate of inheritance therein; nor would a Court of Equity interfere after 20 years' possession unaccounted for by disabilities. (t) So under the former game law it was held that proof of the possession of land of the annual value of upwards of 100*l.* afforded *prima facie* evidence of a seisin *in fee*, so as to qualify the owner to kill game, though if it had been shown to be leasehold, though for a term of 99 years, it being under the yearly value of 150*l.* the owner would not have been qualified. (u) So that it is rarely necessary, after such long enjoyment, to produce title deeds, or show the precise estate; (v) and though it is a common doctrine that in an action of ejectment the lessor of the plaintiff must recover on the strength of his own legal title, and not on the weakness of that of his opponent; yet it is now clearly established that it suffices to prove *undisturbed possession* of an estate by the claimant or his ancestor *for twenty years*, from which a perfect title in fee simple is to be presumed until the contrary be proved; (y)

(r) *Doe v. Barnard*, Cowp. 595, where it was held as to real property corporeal, that if no other better title appear, a clear possession of twenty years is strong presumptive evidence of a fee, and see 7 Bing. 346.

(s) *Doe v. Clark*, 8 B. & Cres. 717.

(t) 1 Turn. & R. 107; see *post*, chap. on Limitations of Actions.

(u) Caldecot, 230; 9 Price's R. 257; 3 B. & Ald. 341, so that there may be not only a presumption of right to the property, but also of the highest or largest estate or interest in the same.

(v) *Doe v. Barnard*, Cowp. 595, where it was held as to real property corporeal, that if no other better title appear, a clear possession of twenty years is strong presumptive evidence of a fee, and see 7 Bing. 340.

(y) *Doe v. Cook*, 7 Bing. 346. On the trial in autumn assizes, 1830, lessor of plaintiff proved that his father had let the premises and received rent from 1797 to 1811, and that lessor had received a higher rent from 1816 to 1819, and that he was heir. The defendant proved that he had been in possession ever since 1819, and after argument for a rule for a new trial, Tindal, C. J. said "it was proved that the father of lessor of plaintiff and his son held the premises for twenty-three years, and during that time received and increased the rent, an unequivocal act of ownership, from which the law presumes a seisin in fee. The father died seised, and he is his heir. That would be enough even in a writ of right to call on the tenant to establish a stronger claim. I cannot see why any period short of twenty

and it should seem that proof even of a very short possession of a person prior to an ouster, even much less than twenty years, would suffice against a party who obtained possession under such person or from him by force or fraud. (z) And a presumption arises, from length of possession, of grants, and releases, and even of acts of parliament, in favour of long possession, and of whatever may be necessary to constitute a right; (a) and, as was strongly expressed by Lord Kenyon, even a grant from the crown, or one hundred grants may be presumed, if it were a case in which the crown could grant, and if not, then a private act of parliament in favour of long possession might be presumed, if it could have been legal. (b)

A lessee, whose tenancy is determined, will not in general be admitted, in defence of an action of ejectment, to show "that his lessor had no title to demise or to recover," (c) nor will a third person, in such case, be allowed to come in and defend as landlord. (d)

The rule is still stronger in *trespass* in favour of a person in possession, even under a void lease, or void license, or demise from the crown, for he may support trespass against a mere wrong-doer, or any one who cannot show a title to disturb him; (e) and the contractors for making a navigable canal, having the permission of the owner of the soil, and erecting a dam of earth and wood upon his close across a stream, for the purpose of completing their work, have a possession sufficient to entitle them to maintain trespass against a wrong-doer; (f) but we have seen that commissioners of sewers, and sometimes the owners of the navigation, are not considered to have any

years' possession by the defendant should raise a presumption sufficient to outweigh the presumption arising from the first twenty years. In many cases it would be extremely hard to cast on the lessor of the plaintiff the burthen of showing how the defendant came into the possession. The lessor of the plaintiff may have been an infant, or out of the kingdom at the time. The earlier presumption therefore must prevail till a better title is shown. See also Lord Rayn. 741; *Drey v. Read*, 8 East, 358; Adams's Ejectm. 3 ed. 77. But the presumption may be rebutted even by the defendant, a stranger, who himself has no title, 11 East, 488.

(z) *Doe v. Dyball*, 1 Mo. & M. 346; 3 Car. & P. 610, S.C.; and see *Allen v. Rivington*, 2 Saund. 11, and notes; 4 Taunt. 548, n. (a); 1 Chit. Pl. 5. ed. 218, note (c); 2 Bla. C. 196, n.

(a) 1 Jac. & W. 63.

(b) 11 East, 280, 488; Cowp. R. 102;

Lofft, 576; when not against ecclesiastical property, 4 Bar. & Ald. 579, or against the king, 9 G. 3, c. 16; Wiglywick, Rep. 236. In cases where proof of mere possession would be sufficient, it would be injudicious to produce title deeds which might unnecessarily disclose some outstanding term or other defect in the legal title of the lessor of the plaintiff.

(c) 2 Bla. R. 1259; 7 T. R. 488; 4 M. & S. 347; but after the expiration of a notice to quit by landlord, it is said that the tenant may show a title in another, under whom he claims, 4 T. R. 683; 3 M. & S. 516; 1 Dowl. & R. N. P. 1; 2 Camp. 11, and Peake's Evid. 319; *sed quare* see Adams's Eject. 3 ed. 276.

(d) 4 M. & S. 347, 348; 2 Young & J. 53.

(e) 1 East, 244; 11 East, 65, 74; Willes, 221; 4 Taunt. 547; 5 Bing. 9; 2 Car. & P. 83; 4 B. & Cres. 574.

(f) 5 B. & Ald. 600.

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Incorporeal
property. (h)

possession or interest, but merely jurisdiction, and therefore cannot sustain trespass. (g)

So at *common law*, with respect to *incorporeal* property, as rights of common, ways, watercourses, ancient lights, markets, fairs, and other easements and privileges, *twenty years' uninterrupted enjoyment* (i) of either has long been considered sufficient *prima facie* evidence of a grant, in the absence of evidence to the contrary, to establish a perfect right; and if such long uninterrupted enjoyment were during a tenancy in fee, it would be too late for him or any succeeding owner, against whom such right was set up, to dispute the claim, unless he could show that it was exercised expressly under a mere qualified permission, which such owner was at liberty at any time to revoke; (j) though as the assent of a tenant for life, or of a parson, the owner of glebe, in right of his benefice, to the enjoyment, ought not to prejudice a subsequent owner; the latter might defeat the effect of such long enjoyment by proving that it was during the tenancy for life, (k) or the time of a previous incumbent. (l) This common law rule has been confirmed and rendered more clear by the recent enactment. (n)

Secondly. Title
by descent.

With respect to *descent*, this is one of the most frequent and in general simplest titles to real property, whether corporeal or incorporeal; but still the whole law upon the subject is replete with learning and fills volumes. (n) In establishing a claim by descent it must first be shown who was *last legally seised*, (or, in other words, in actual possession or in receipt of the rents of the property sought to be recovered, technically termed in *real* actions the *esplecs*;) (o) and then to prove his death, and next all the different links in the chain, which will show that the claimant is the next and proper heir of the person so *last actually seised*, (p) and the *times* of each death, or at least to show successively through whom the *right* from time to time descended,

(g) 2 Moore, 266; 1 B. & C. 205, 221; 2 Dowl. & R. 316; *ante*, 239, 240.

(h) See *ante*, 204, 205, as to modes of claiming incorporeal property, and *post*, *Prescription and Custom*; 2 & 3 W. 4, c. 71.

(i) See important observations on these words in *Benest & Pison*, Knapp's Rep. 60; *post*, chap. ix.

(j) 1 Saund. Rep.

(k) 11 East, 372; 2 Saund. 173, d.

(l) 4 B. & Ald. 579; but see *post*, *Prescription*, 282, 286.

(m) 2 & 3 W. 4, c. 71; *post*, 285.

(n) See in general Chitty, H. on Descents; 2 Bla. C. 200 to 240; 2 Woodes.

V. J., 250, 265.

(o) Proof of possession, or receipt of rents, is presumptive evidence that the ancestor was seised in fee simple, and continued so seised till he died, Bull. N. P. 103.

(p) 2 Wils. 45. In a count in a real action every stage of the descent must be stated; and it will not suffice to claim as second cousin and heir of the person last seised without showing the intermediate relations, and how second cousin, 2 Saund. 45, a; 5 East, 272; 3 Bos. & Pul. 453. See exceptions, 2 Chitty on Pleadings, 5 ed. 571, a, note (a).

or, had they been living, would have descended, from the person last seised to the claimant. If the claimant insist that he is *lineal* heir, he is to prove the death of the person who so died seised, and his marriage, and the birth of his son, and then the marriage and death of such son, and the birth of his son, and his marriage and death, and the birth of the claimant. If he claim by *collateral* descent, then the marriages, births, and deaths, and the identities of each relative through whom the pedigree is to be established, must be shown, so as to prove that the claimant is the nearest and oldest surviving collateral heir. If in any part of the pedigree the claim be through a *younger* brother of several, then the deaths of the elder brothers, or other elder collateral relations, must be shown; and it is usual and prudent to *be prepared* to prove affirmatively that each of them died unmarried, or at least without issue, so as to avoid any doubt upon the trial. It has even been supposed and stated in a very valuable work, that this latter evidence is essential even in the first instance; (q) but that supposition has been recently refuted; and it suffices on a trial in ejectment (at least in the *first instance*) to prove the death of every elder relative; and then, if the opponent should prove his marriage and the birth of his child, the claimant may prove *in reply* that he died at *a time*, such an age, or under such circumstances, so as not to impede the course of descent relied upon. (r) Thus it was held that proof by an old member of the family that many years before, a younger brother of the person last seised had gone abroad, and that the repute of the family was that he had died there, and that the witness had never heard in the family of his having been married, is *prima facie* evidence that the party was dead without lawful issue, to entitle the next claimant by descent to recover in ejectment; Lord Ellenborough observing, "The evidence was sufficient to call upon the defendant to give *prima facie* evidence at least that the younger brother was married; for what other evidence could the lessee of the plaintiff be expected to produce that he was not married, than that none of the family had ever heard that he

(q) *Richards v. Richards*, 15 East, 294, note; and see Adams's Eject. 3 ed. 282. It has recently been gravely argued by counsel that as marriage is enjoined by Scripture, and increase a natural result, it *must be inferred* that every man has married, and has issue, until the contrary be proved, and that therefore the negative ought to be proved. But the Court (Ld.

Tenterden, Bayley, Holroyd and Littledale, J.) treated such argument as wholly untenable.

(r) K. B. A. D. 1826. It is however always safer to be prepared to prove the death without issue in the first instance, so as to clear the title from the least suspicion of defect.

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was. (s) But in deducing a title to a purchaser, it is usual, unless where such fact may happen to be disclosed by recitals in old deeds executed twenty or thirty years back, to require some satisfactory evidence of the death and failure of issue capable of inheriting of every person through whom the title must be deduced.

It is usual on the trial to produce a *pedigree* at least to assist the judge and perhaps the jury in following the evidence. (t) There are two modes of establishing a pedigree; the first by the testimony of old witnesses well acquainted with every member of the family and the events respecting them; and the second by copies of registers and proof of identity of the parties therein referred to. Hearsay and reputation is admitted in evidence in cases of pedigree; (u) and it is usually found that the evidence of perhaps one old intelligent witness (especially if a female) will dispense with the necessity for any other proof, though it is certainly advisable to have in court copies of the registers of marriages, births, and burials, ready to be proved by a witness who has examined the same with the originals, so as to assist or corroborate the witness as to dates and other facts. The course of descent may be shown and traced by numbers in a collateral pedigree somewhat in the following form. (x)

(s) 15 East, 293; and see Bull. N.P. 234.

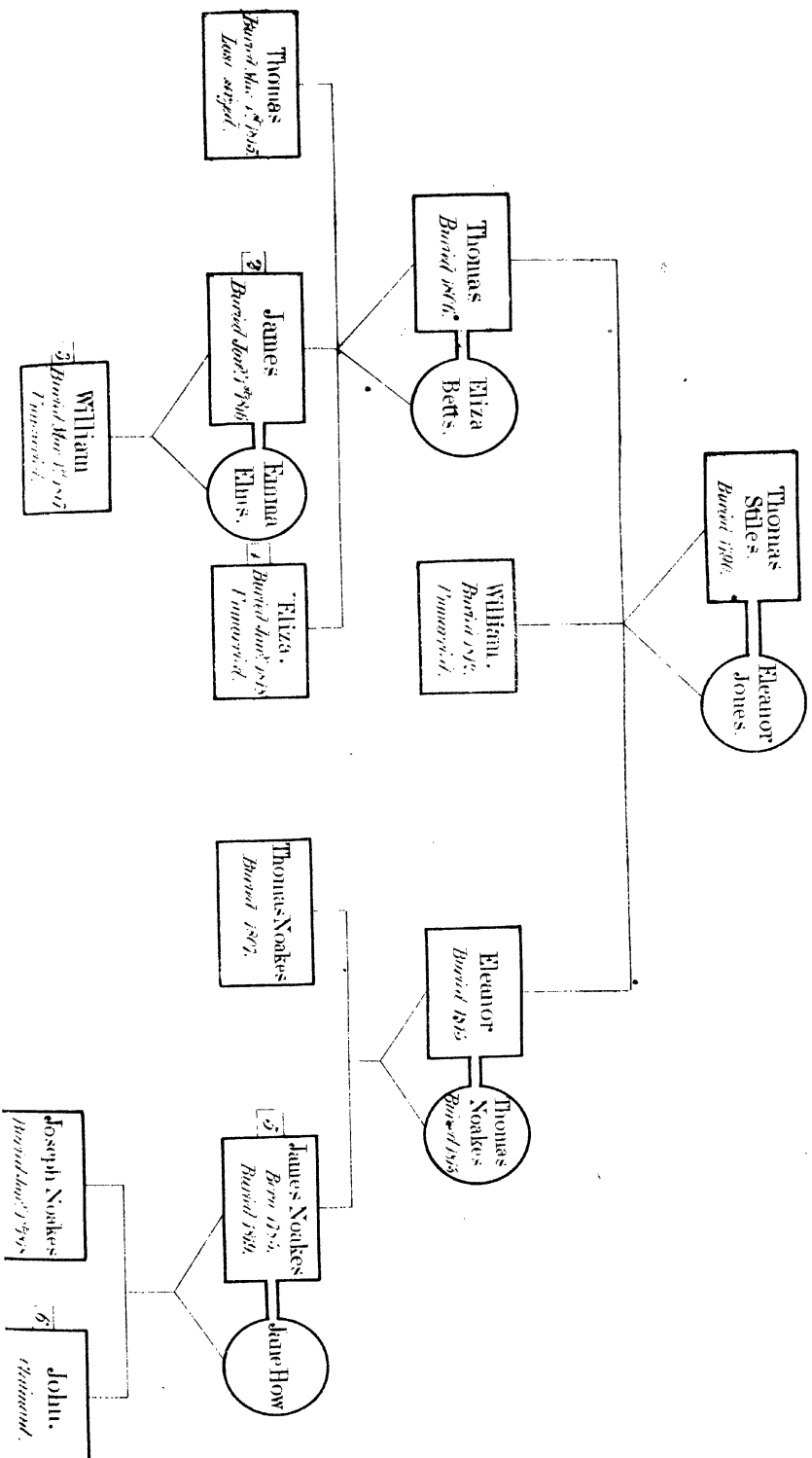
(t) *Doc v. Lord*, 2 Bla. Rep. 1099. See the table of collateral descent annexed.

(u) 10 East, 120.

(x) The form of the *pedigree* produced upon a trial of an action of *assumpsit* or of a *real* action, may be as annexed. The numbers show the course of descent; the squares the relations through whom the relationship is traced; and the circles the persons with whom the relations married, so as to show the parentage. — Thomas Stiles (No. 1) was last legally seized, John Noakes (No. 6) claims as his cousin; and on the death of said Thomas Stiles, the right descended to his brother James Stiles (No. 2), who survived him; and on the death of James the right descended to his son William (No. 3), and on his death to Eliza (No. 4), and on her death to James Noakes (No. 5), her first cousin, (the other prior and intermediate relations having previously died,) and on the death of said James Noakes, in 1819, the right descended to his son the claimant John Noakes (No. 6). Here the claimant must prove, 1st. The seisin of Thomas Stiles (No. 1) (the grandson), by proving his receiving rent, recently before his death, from the defendant's father as tenant;

2dly, His death in 1815, and if it be shown that he was married, then that he died without issue; 3dly, The marriage of his father, Thomas, with Eliza Betts; 4thly, The birth of the said Thomas Stiles (No. 1); 5thly, The births of James Stiles and Eliza Stiles (Nos. 2 & 4); 6thly, The death of their said father; 7thly, The marriage between James Stiles (No. 2) with Emma Elms; 8thly, The birth of their son William; 9thly, That the said William the son died in March 1817 without issue; 10thly, That Eliza Stiles died in 1818, also without issue; 11thly, That Thomas Stiles the grandfather married Eleanor Jones; 12thly, That said Thomas (the father) and William and Eleanor were their children; 13thly, The death of the said Thomas Stiles the grandfather; 14thly, The death of said William Stiles, his son, without issue; 15thly, The marriage between Eleanor Stiles, the daughter, and Thomas Noakes; 16thly, Her death; (but the death of Thomas Noakes need not be proved, because as his wife was never actually seized, he could not be entitled to the estate as tenant by the curtesy); 17thly, The births of their sons Thomas and James Noakes; 18thly, That Thomas

Table of a Collateral Pedigree.



III. Titles by *purchase*, as distinguished from those by descent, are enumerated by Blackstone to be by, 1. Escheat, 2. Occu-
pancy, 3. Prescription, 4. Forfeiture, 5. Alienations.

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III. Title by
PURCHASE^(y)

1. By escheat.
(z)

1. Title by *escheat* is when there is no heir, either *propter defectum sanguinis*, (or *tenentis* when an alien,) or *propter delictum*, where the owner has been attainted and no person can claim through him, and therefore the land naturally resulted back by a kind of reversion to the lord of the fee. (a) Escheat by *forfeiture* is now greatly limited by the 54 Geo. 3, c. 145, which enacts that attainder of felony, (excepting treason and murder, and the abetting, procuring or counselling the same,) shall only forfeit the interest of the offender *during his life*. As respects land of *freehold* tenure, it is said that if a *cestui que trust* be attainted of felony, he forfeits his beneficial interest, (b) but it has been doubted whether a trustee will by his felony, or even treason, forfeit the trust estate, or whether the crown or the lord is bound by the trust. (c) It should seem, however, that the crown certainly is not bound, from the 39 & 40 Geo. 3, c. 88, s. 42, which provides that where trust property escheats to the crown, his majesty may direct the execution of the trust, and may make grants to the trustees for that purpose, or may make grants to any persons for the purpose of restoring the same to any of the family of the persons whose estates the same have been, or of rewarding any persons making discovery of the escheat, but it does not determine in what cases lands escheat, leaving that question to be decided at common law. (d) In case of death of a *cestui que trust* without an heir of freehold, it is said that the trustee, and not the crown, will be entitled to hold the property for his own bene-

(the son) died in 1807, a bachelor; 19thly, The marriage between James Noakes and Jane How; 20thly, Birth of John Noakes (No. 6) the claimant; 21st, The death of his father in 1819; 22d, The death of Joseph Noakes, his brother, without issue, previously in 1818; and lastly, The disclaimer by the defendant before the demise in the declaration. The claimant must throughout be prepared to prove the identity of each party, for fear any confusion or doubt should arise.

It will be observed that it is essential to be prepared to prove the times of the deaths, in order to show how the right successively descended. In a count in a real action, as in a writ of right, it is necessary to allege accurately, as well as to prove as alleged, through whom successively the right descended, showing very

precisely each link in the chain of descent; see fully 2 Chitty on Pleading, 5 ed. 571, 572, note (a), and 3 Id. 1360 to 1362; and if inaccurately stated, the court has refused leave to amend. 3 Bos. & Pul. 456; 1 New Rep. 233; Tidd, 9 ed. 699. But in such real actions it is not necessary to state in the count the times when the descents took place.

(y) See divisions, ante, 272, 4 Burn's J. Poor, Settlement by Purchase, 618 to 631.

(z) See divisions, ante, 272, and see in general, Cruise's Digest, and Com. Dig.; Chit. Eq. Dig. Escheat; 2 Bla. C. 244.

(a) Co. Lit. 13.

(b) Hob. 214; Hard. 490; 1 Mad. Ch. P. 437.

(c) See cases 1 Mad. Ch. Pr. 456, h.

(d) 1 Mad. Ch. Pr. 457.

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fit. (e). When the crown is entitled, it has been questioned whether it is not necessary for an office to be found, in order to vest the property, and at least the crown cannot, without such office, vest any interest in a *third* person by grant or otherwise. (f)

It is the ordinary rule for the crown, upon petition, to give a lease or grant to the party discovering an escheat, with a view to encourage discovery. (g) And where *A.* and *B.* having joined in a petition to the crown, representing an estate to have escheated, procured a grant, it was held in a Court of Equity that *A.* could not afterwards set up a claim to one part under a prior title in himself, while taking the benefit of the grant as to the rest, (h) and a grant from the crown made under a mistake may be recalled, notwithstanding any derivative titles depending on it. (i)

Land of copyhold tenure, it is said, cannot escheat to the crown but to the lord of the manor of which it was holden. (k) It is not forfeited by conviction of felony not followed by attainder, unless by particular custom, (l) and then only for life of the offender, except in case of treason or murder. (m) And the lord can only seize for want of an heir *quousque*, that is, until one appear; nor is a copyhold forfeited by neglect of the heir coming to be admitted, without a special custom, and then not until after presentment of the death of the copyhold tenant, and three proclamations at three consecutive courts. (n) And if a copyholder be convicted of a capital felony, and obtain even a conditional pardon before the lord has seized, he will be restored to his estate and beneficial enjoyment, and may maintain trespass against an intruder. (o)

2. Special occupancy. (p)

2. With respect to title by priority of *possession*, we have already seen that it is sufficient against a wrong-doer, and that twenty years' uninterrupted possession of corporeal or incorporeal property will be a *prima facie* title against all the world, at least as respects personal and mixed actions. (q) But we are here only to notice that interest which is termed *title by*

(e) 1 Bla. R. 123; but see 2 Jac. & W. 338, note, and cases Chit. Eq. Dig. tit. Escheat.

(f) 8 Hen. 6, c. 16; 18 Hen. 6, c. 6; 12 East, 76; 5 B. & Cres. 587.

(g) 7 Ves. 71; 6 Ves. 809.

(h) *Cumming v. Forrester*, 2 Jac. & W. 334.

(i) Id. 342.

(k) 2 Ves. jun. 169; but see 2 Sim. & St. 498.

(l) 5 B. & Ald. 510; Burn's J., For-

feiture, I.

(m) 54 Geo. 3, c. 145.

(n) 1 B. & Adolph. 736; see 3 T. R. 162.

(o) 5 B. & Cres. 584.

(p) See divisions, *ante*, 279; and see in general 2 Bla. Com. 244, 258 to 263, in notes; Com. Dig. Estates, F.; Bac. Ab. Estates for Life and Occupancy, B.; 1 Cruise, 90; 3 Id. 336; Vin. Ab. Occupant; 6 T. R. 291; 7 Bing. 178.

(q) *Ante*, 273.

special occupancy, that is, the interest intervening between the death of a tenant *pur autre vie* and the death of the *cestui que vie*.^(r) This is now regulated by 29 Car. 2, c. 3, s. 12, and 14 Geo. 2, c. 20, s. 9, the first in effect enacting that every estate *pur autre vie*, whether there be a special occupant or not, may be devised like other estates in land, by a will attested by three witnesses; and if not so devised, and there is a special occupant, (that is, where the *heirs* are named in the limitations of the deed or will, creating the estate *pur autre vie*;) then it shall be assets by descent in the hands of *such special occupant*; but if there be no special occupant, then it passes like personal property to executors and administrators, and shall be assets in their hands; and the 14 Geo. 2, c. 20, s. 9, enacts, that the surplus of such estate *pur autre vie*, after payment of debts, shall go in a course of distribution like a chattel interest.^(s) This estate is not, strictly speaking, as sometimes inaccurately termed, a *descendible* freehold,^(t) because the heir, when named in the grant, does not take by descent; but the estate partakes *somewhat* of the nature of a personal estate, though it is not a chattel interest for many purposes, but before the new reform act gave a qualification to vote for members of parliament, and to kill game, and some others.^(u) If an estate *pur autre vie* be limited to a man, his heirs, executors, administrators and assigns, and be not devised, it descends to his heir as the named special occupant in preference to the executors, and is only liable for specialty debts,^(x) unless in the case of traders.^(y) But if it were limited to a man and his *executors*, the executor takes it in that character, and subject to the same debts as personal estate;^(z) and the interest, if any, beyond the debts, belongs to those who are entitled to the personal estate.^(a)

As regards corporeal or incorporeal property of *freehold* tenure, there is no difference, since the 29 Car. 2, c. 3, between a grant of corporeal and incorporeal hereditaments *pur autre vie*, and that statute, in case of rents and other incorporeal hereditaments, does not enlarge,^(b) but only *preserves* the estate of the grantee;^(b) and a rent charge *pur autre vie*, if the grantee die, living *cestui que vie*, goes to the grantee's executor,

(r) 2 Bla. C. 258.

(s) See explanation and observations on these acts, 6 T. R. 291; 7 East, 186; 7 Bing. 178, and notes to 2 Bla. C. 258 to 263.

(t) See Vaugh. 201; 2 Bla. R. 1148.

(u) Per Lord Kenyon, in 6 T. R. 291.

(x) 4 T. R. 229.

(y) 11 Geo. 4, and 1 W. 4, c. 47.

(z) 4 T. R. 224, 229.

(a) 7 Ves. 425.

(b) 3 P. Wms. 264, note; 7 Bing. 178.

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though not named in the grant. (c) This estate may be entailed, but *any* alienation of, or even a devise by, the *quasi* tenant in tail, will bar the interest of him in remainder. (d)

With regard to occupancy of copyholds, it appears that there could not be a *general* occupancy, because no one could gain a copyhold by such means, but only by admission of the lord, the freehold being in the lord, and occupancy being allowed by the common law, upon feudal principles, for supplying the freehold. (e)

But a *special* occupancy by the heirs, if named, may be of a copyhold, because by the limitation to the heirs, the lord has expressly excluded himself during the life of the *cestui que vie*. (f) But it must be observed, that the above mentioned statutes, 29 Car. 2, and 14 Geo. 2, do not extend to lands of copyhold tenure, and therefore it was held, that a person who had been admitted tenant upon a claim as administrator *de bonis non*, to the grantee of a copyhold *pur autre vie*, had no title in such character, and could not recover in ejectment by virtue of such admission, as upon a new and substantive grant by the lord. (g)

3. Prescription
or custom. (h)

3. Title by prescription or custom only relates to incorporeal hereditaments, such as common of pasture, turbary, or ways, and other easements, for a right to *corporeal* property cannot be so claimed; title by *custom* is properly a *local usage*, as for *all* the inhabitants of a parish, &c. or for all copyholders in a particular manor, or for all copyholders of a particular copyhold tenement in a manor, by custom to *have* common of pasture over the lord's waste, or to *be excused* from some liability, as in the case of a *modus*; whereas title by *prescription* is merely a *personal usage*, as that *A.* and *his ancestors* (when the right is in *gross*,) or that *A.* and *those whose estate* he hath in such land, &c. (when the right is *appendant* or *appurtenant* to named corporeal freehold property,) have from time immemorial used and enjoyed a certain incorporeal advantage or privilege, as a right of way or common; (i) and all *prescription* must be either in a man and his *ancestors*, or in a man and

(c) *Bearpark v. Hutchinson*, 7 Bing. 178.

(d) 3 Cox, P. Wm. 266; 6 T. R. 293, and 2 Bla. C. 261, note 4.

(e) 1 Roll. Ab. 511; 2 Ld. Raym. 1000; 7 East, 186.

(f) *Gilb. Ten.* 326; 2 Bla. R. 1148.

(g) 7 East, 186; and see *Amb.* 152;

Scriv. Cop. 106.

(h) See division, *ante*, 279, and title by mere possession, *ante*, 273, and see in general, 2 Bla. C. 244, 263 to 266. *Cruise's Digest*, Prescription, and *post*, "Grant," which prescription presumes. See further *post*, chap. ix. *Knapp's Rep.* 60.

(i) *Co. Lit.* 113; 2 Bla. C. 263.

those *whose estate* in some named incorporeal real property he hath, which last, in respect of such estate, and from the words in italics, is called prescribing in a *que estate*.^(k) If a party claim an easement by prescription as a member of a *corporation*, then he must prescribe under the corporation, stating that *such corporation* have immemorially been entitled to have for themselves and their burgesses common of pasture, &c., and then aver that he was a burgess, &c.^(l) Where a *copyholder* claims common or other profit in *his lord's soil*, he cannot *prescribe* for it in his own name, on account of the baseness and weakness of his tenure, (which we have seen is, in consideration of law, only a tenancy at will,) neither can he prescribe in the lord's name, for the lord could not prescribe even on behalf of his tenant for common or other profit in *his own soil*; consequently of necessity a copyholder must, according to the evidence he can adduce, entitle himself by an allegation of a *custom* in the manor for *all* copyholders therein to have common of pasture in the lord's waste, or for the copyholder of his *particular* customary tenement to have such common, &c. But where a copyholder claims common or other profit in the soil of a *stranger*, as on the wastes of an adjoining manor, he must then *prescribe* in the name of his own lord, viz. that such lord and his ancestors, and all those whose estate he hath in his manor, have had common, &c. in such a place for himself and his customary tenants, &c.; and then state the grant of the customary tenement to himself, and the consequent right to the enjoyment of the easement, for the lord has the fee of all the copyholds of his manor.^(m)

All *customs*⁽ⁿ⁾ suppose an original *actual deed or agreement*, and all *prescriptions* suppose an original *actual proper grant*, founded on adequate consideration, but which has been lost, though to be presumed from long user, as in the case of a *modus* for tithes.^(o) It must have had a reasonable and *appropriate* commencement, or even at this day neither the custom nor the prescription could be supported.^(p) But the general rule is, that every such claim is good if it *might* have had a legal commencement; ^(q) such, however, must, in legal contem-

(k) 1 Saund. 316, note 2; 4 T. R. 718; Cro. Car. 599.

(l) 1 Saund. 340, b.

(m) 4 Coke, 31, b; 6 Coke, 60, b; Hob. 86; Cro. Eliz. 390; Moore, 461; 1 Saund. 319; 5 Taunt. 365.

(n) 2 Bla. Com. 30, 31.

(o) Id. 264, 265.

(p) Id. 30, 31, 264, 265; *ante*, 153 to 158, as to appendants and appurtenances.

(q) 1 T. R. 667.

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plation, have been *immemorial*, that is, technically, "from time whereof the memory of man runneth not to the contrary," and which by law commenced in the beginning of the reign of Richard the First, A. D. 1189, so that until the late act, (r) any custom or prescription might have been destroyed by evidence of its non-existence in any part of the long period from that time to the present, (s) though *nonuser* for sixty years precluded any person from afterwards setting up a claim to a prescriptive right. (t) But the production of an ancient grant without date was holden not *necessarily* to destroy a prescriptive right of the same precise nature, because such undated deed might have been executed either prior to the time of legal memory or in *confirmation* of such prescriptive right, and not necessarily establishing that such right did not previously exist; (u) and it has been considered that a prescriptive right will not be destroyed by implication merely from the terms of an act of parliament. (v)

It has also long been established in practice that as well customs and prescriptions would be sufficiently *prima facie* proved by twenty years' uninterrupted user, or exercise of the claimed right or exemption, from which evidence a jury ought to be directed that they should infer and find the existence of the right immemorially; (y) and from upwards of 20 years' *uninterrupted enjoyment* of an easement or profit *a prendre*, grants, or as Lord Kenyon said, a hundred grants would be presumed even against the crown, if by possibility they could legally have been made. (z) There is, however, an exception to that general rule in the claim of *toll thorough*, where it is necessary to show expressly for what consideration it was granted, though such proof is not necessary in respect of toll traverse. (a) But notwithstanding this rule of evidence in favour of a custom or prescriptive right, still they, especially the latter, were liable to be defeated by actual proof negating the supposition of an

(r) 2 & 3 W. 4, c. 71.

(s) 2 Inst. 238; 2 Bla. C. 31, note (u); but *per* Ellenborough, C. J., there may be a good *modus* to include *turkies*, though that bird might have been introduced into this country within time of legal memory, as if there were a *modus* "for all domestic fowl," 12 East, 35. So although *coaches* were not in common use till after the reign of Elizabeth, yet a right of way might extend to them under a lost grant of way for "all carriages, &c." See also *Ld. Kensington v. Pugh*, 1 Young, 125; and 2 & 3 W. 4, c. 100.

(t) 32 Hen. 8, c. 2; but see excep-

tions, Chit. Col. Stat. 697, in notes.

(u) 2 Bla. R. 989.

(v) 3 B. & Ald. 193.

(y) 2 B. & Cres. 54; 2 Saund. 175, a.; Peake, Ev. 338; 4 Price, R. 198; 2 Price, R. 450, as to *customs*, and as to *prescriptions*, *Id.*; 11 East, 284, 495.

(z) 11 East, 284, 495. As to the necessity for the usage and enjoyment having been *uninterrupted*, see *Benest v. Pisson*, Knapp's 60. It must have been *possessio longa continua et pacifica, nec sit legitima interruptio*, *Id.* *ibid.*

(a) 1 T. R. 667; 1 Bar. & Cres. 223.

ancient agreement or grant, or by showing how the right had actually commenced, and that under circumstances which negatived any permanent right; and to remedy which the recent most important act, 2 & 3 W. 4, c. 71, was passed, entitled, "An Act for shortening the Time of *Prescription* in certain cases," and which recites, "whereas the expression, time immemorial," or "time whereof the memory of man runneth not to the contrary," is now by the law of England, in many cases, considered to include and denote the whole period of time from the reign of King Richard the First; whereby the title to matters, that have been long enjoyed, is sometimes defeated *by showing the commencement of such enjoyment*, which is in many cases productive of inconvenience and injustice; (b) and then enacts, that claims by custom, prescription, or grant, to a *right of common or other profit or benefit*, to be taken and enjoyed from or upon any land of the king's, or upon any ecclesiastical or lay person, or body corporate, (except as therein excepted, and tithes, rent, and services,) shall not be defeated after *thirty years'* enjoyment by actual proof of the commencement, but provides, *that nevertheless such claim may be defeated in any other way by which the same was, at the time of passing the act, liable to be defeated.* (c) But that after *sixty years'* enjoyment of such a right it should be absolute, unless had by consent or agreement, expressly made or given for that purpose by deed or writing. (d) There is then a similar enactment, as to any way or other easement or watercourse, or to the use of any water (e) uninterruptedly enjoyed for *twenty years*, subject nevertheless to be defeated as aforesaid; and a claim to the use of *light*, uninterruptedly enjoyed for *twenty years*, is indefeasible, unless shown to have been under a consent by deed or writing; (f) and it is provided, that no interruption shall prejudice unless submitted to for a year. And then follow regulations with respect to the form of pleading, authorizing the mere statement of the long continued enjoyment without pleading in a *que estate*, as was before essential, with exceptions as to infants and other persons, and enjoyments under tenants for life. (g) It will be observed that the principal objects of this act were two,

(b) The ancient rule was not objectionable in its commencement, see 2 Bla. C. 31, note (u). It will be observed from the words in italic that the act only extends to that particular mode in which a prescriptive right might be defeated, and that the act does not extend to other cases, such as extinguishment by *unity of seisin*, &c.

(c) *Seemle*, therefore, that proof of *unity of seisin* might still defeat a claim of common or profit *a prendre*.

(d) 2 & 3 W. 4, c. 71, s. 1.

(e) *Seemle*, this does not extend to a right of *fishing*.

(f) 2 & 3 W. 4, c. 71, s. 2, 3.

(g) *Id.* s. 4 to 8.

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first, to prevent a claim by custom or prescription from being defeated by proof that it *originated* within the ancient time of legal memory; and secondly, to simplify the course of pleading; but that it expressly reserves other objections to such claims, such as *extinguishment* by unity of seisin; and therefore it will be found that much of the ancient law still remains unaffected. The *act* affects the king, ecclesiastical persons, and corporations as well as lay persons, so that now an incorporeal right may exist after twenty years' possession against the king or the successor of a rector or other ecclesiastical person; (*h*) and consequently it is still advisable in conveyances to introduce fresh words of grant of common or way, &c. so as to provide for or prevent the consequences of any such extinguishment. (*i*) There is an enactment upon the same principle as to modusses and exemptions from *tithes*. (*k*)

Fourthly, Title
by forfeiture. (*l*)

Fourthly, Title by *forfeiture* we have seen is the fourth subdivision of title by purchase, and was again sub-divided by Blackstone into forfeitures—1st. By crimes and misdemeanors; 2dly, By alienation contrary to law and disclaimer; 3dly, By lapse or non-presentation to a benefice in due time; 4thly, By simony; 5thly, By non-performance of conditions; 6thly, By waste; 7thly, By breach of copyhold customs; and 8thly, By bankruptcy; (*m*) to which may be added other means of total or partial forfeiture, or loss of an estate; 9thly, By insolvency; and 10thly, By judgment and *elegit*, or extent, &c.

1. Forfeiture for *crimes and misdemeanors* are for treason, felony, misprision of treason, premunire, &c. (*n*) We have seen that the 54 Geo. 3, c. 145, prevents any attainder, except for high-treason or murder, or for abetting the same, from dis-inheriting any heir, or prejudicing the claim of dower, or the right of any other person than the offender; and the forfeiture is only for the life of the offender; and even to that extent there should be an office found. (*o*)

(*h*) 2 & 3 W. 4, c. 71, s. 1, 2; but see s. 7 & 8; 4 B. & Ald. 579.

(*i*) *Ante*, 156, 157, as to *appurtenances* and as to rights of common. In a recent case, K. B. Hil. T. 1833, it was held that though the conveyance professed to pass all ways appurtenant or *belonging* to the principal messuage, yet that unity of previous seisin destroyed the claimed way, because the word *belonging* was only synonymous to appertaining; not like

the words, all ways therewith *used*, &c.

(*j*) 2 & 3 W. 4, c. 100; and 1 Young, 12.

(*l*) See division, *ante*, 279, and in general 2 Bla. C. 267 to 287.

(*m*) 2 Bla. C. 267, chap. xviii.

(*n*) See in general 1 Chitty's Crim. L. 727 to 737; Burn's J., Forfeiture; *ante*, 279, as, to escheat.

(*o*) 5 Bar. & Cres. 587.

2. Forfeiture may also be by conveying to an *alien*, who may take but cannot hold, and upon office found the king is entitled in case of freehold tenure. (p)

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3. *Alienations* by a *particular tenant* for a *time*, or in a manner inconsistent with the nature of his qualified interest or estate, is a ground of forfeiture, and entitles the person next in remainder or reversion to enter and enjoy the estate; as if a tenant for his own life alien by feoffment, or fine, or recovery, for the life of another, or in tail, or in fee, these being estates which either must or may last longer than his own, and the creating them is not only beyond his power, but inconsistent with the nature of his interest, and a fraudulent attempt to prejudice those in remainder or reversion, and consequently are forfeitures of his own particular estate. (q). But we have seen that some conveyances are termed *innocent*, and do not occasion a forfeiture; (r) and that a lease and release, or bargain and sale, by a tenant for life, though *professing* to pass the fee, are of this nature, because no estate passes by those modes of conveyance other than what might legally pass. (s) So a fine of an *equitable* tenant for life will not work a forfeiture. (t) So the alienation in fee by *deed* by tenant for life of any thing which lies in grant, as an advowson, common, &c. does not amount to a forfeiture; (u) though a *fine* in fee of such an estate would be a forfeiture. (u) But the forfeiture by such improper conveyances will not prejudice leases, &c. by him previously granted. (v)

Disclaimer is a denial by a tenant of his landlord's title either by refusing to pay rent, or by setting up a title in himself or a third person, and this is a distinct ground of forfeiture of the lease, or other tenancy, (y) whether of land or tithe; (z) but a *qualified* denial, as an offer to pay rent, if the claimant by derivative title will adduce reasonable evidence of his right, will not necessarily amount to a disclaimer. (a).

4. Forfeiture by *lapse* applies only to *advowsons*, and the exercise of the right of presenting an ecclesiastical person to a vacant church and its incidents, and which presentment must

(p) Co. Lit. 2, b; 5 Co. 52; as to copyhold, see 1 Mod. 17; All. 14.

(q) *Ante*, 243, 244; Co. Lit. 251; 1 Co. 14, b; and see reasons, 2 Bla. C. 274, 275; and see as to these forfeitures, 1 Saund. R. 319, b, &c.

(r) *Ante*, 243, 244.

(s) *Ibid*.

(t) 1 Prest. on Convey. 202.

(u) Co. Lit. 251, f.

(v) *Id*. 233.

(y) Bul. N. P. 96; when a qualified denial will not operate as a disclaimer, see Peake's R. 196; Adams's Eject. 124, 125; 2 Bla. C. 275.

(z) 1 Brod. & Bing. 4.

(a) Peake's R. 196; any more than a similar answer would necessarily import a conversion in trover, 5 B. & Ald. 247; 3 Campb. 215; 2 Bulstr. 312; 2 Bos. & Pul. 464; 5 Moore, 259; 1 Esp. R. 83.

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be made within six calendar months, to prevent the suspension of religious worship in the parish, or the right will, in most cases, be forfeited for that turn, and until another fresh vacancy. (b)

5. The offence of *simony* is defined and punished as a distinct act of forfeiture by the 31 Eliz. c. 6, s. 3. (c)

6. *Forfeitures by breaches of covenants* in leases and other deeds are by far the most frequent subjects of litigation, (d) and to take advantage thereof it is not essential that the party should have any reversion. (e) But the proviso operates only during the term. (f) We may here observe in general, that the breach complained of must come within the *very letter* of the covenant, or the lease will not be forfeited; (g) and though courts have formerly and not merely inclined a construction against forfeiture; (h) but of late a more correct rule has been observed, and covenants as well as clauses of re-entry are to be fairly construed and given effect to according to the words and apparent intention of the parties, precisely in the same manner that all other contracts ought to be construed at law, leaving the party whose lease may be thereby forfeited to seek any *equitable* relief to which he may be entitled in a Court of Equity. (i)

Waivers of forfeitures may be either by express declaration, or by act inconsistent with the supposition of a forfeiture, and, in effect, admitting a *continuing* tenancy, as acceptance of rent that has accrued due *since* the act of forfeiture, or encouraging the tenant to make subsequent improvements; and these are to be liberally

(b) 2 Bla. R. 276; *Mirchouse on Advowsons*, 162; 44 Geo. 3, c. 43.

(c) See *ante* 164, and in general 2 Bla. C. 279, and notes; *Fox v. Bishop of Chester*, 2 Bar. & Cres. 635; *Ambl.* 268; 2 Bla. R. 1052; 2 Bro. Parl. Cas. 811; 5 B. & Ald. 835; 4 M. & S. 66; 1 East, 391; 6 Taunt. 333, and notes; 2 Bla. Com. 279, 280; 8 B. & Cres. 25.

(d) See in general the cases ably collected and observed upon in *Adams on Ejectment*, 3d ed. 73, 158 to 174, as to forfeiture for non-payment of rent, and 175 to 198, as to forfeiture by other breaches of covenant.

(e) *Doe v. Bateman*, 2 B. & Ald. 168.

(f) 2 Wils. 127.

(g) *Adams's Ejectment*, 176; 3 Bar. & Adol. 299, S. P.; as to the modes of completing and taking advantage of forfeiture

for non-payment of rent, see chap. v. *post*.

(h) 2 Term R. 739, 744; and see Co. Lit. 201, b., 202, a; 7 Co. 28; and 1 Saun. l. 287, in notes, where it is said that the law leans against forfeiture.

(i) Lord Tenterden uniformly observed to juries, in actions of ejectment for forfeiture, "that they were not to indulge any prejudice against the action on the ground of forfeiture being supposed odious, but merely to consider whether, upon the evidence, there had been a substantial breach of covenant." And see 4 M. & S. 265, and cases cited 3 B. & Adolp. 301. As it is not always for the benefit of a landlord that a forfeiture should be taken advantage of and a lease treated as forfeited, a Court of Equity will sometimes restrain an action of ejectment for a forfeiture of a lease of a *lunatic's* estate, 1 Turn. & R. 34.

though not indiscriminately given effect to. (k) So, if the lessor by his conduct mislead the tenant, and himself insure in his own name, instead of the tenant, he may be precluded from taking advantage of the forfeiture. (l) So a distress for rent that accrued due after the forfeiture waives it, (m) but not a distress for rent antecedently due and distrained for within six months after the forfeiture. (n) And where a lease contained a clause of re-entry in case the rent should be in arrear twenty-one days after notice, and there should be no sufficient distress, it was held, that the landlord having distrained within the twenty-one days, though he continued in possession afterwards, did not waive his right of re-entry; (o) and where a lease contained a general covenant to repair, and also a covenant to repair upon three months' notice, it was held, that the landlord, by a notice to repair *forthwith*, had not waived his right of re-entry for the breach of the general covenant, (p) though, in a subsequent case, where the notice was to repair within *three months*, it was held, that the giving it suspended the right to take advantage of the breach of the general covenant until the expiration of that time. (q) To render the waiver effectual, it must be shown that the landlord well knew of the act of forfeiture at the time of the supposed act of waiver, for otherwise the supposed waiver will not have that effect; (r) and a complete waiver will not affect the right to treat a *subsequent* breach of a continuing covenant, as to keep in repair, reside on the demised premises, insure, &c., as a fresh ground of forfeiture; (s) and a mere knowledge of a cause of forfeiture, without immediately proceeding, nor mere passive suspension of proceedings without receipt of rent, or encouraging or knowingly permitting the tenant to make improvements, will not constitute any waiver. (t)

It has been laid down that even in leases *for years* there is a distinction as to the effect of a waiver when the clause of forfeiture is that the lease shall be wholly null and void to all intents and purposes, and when it is merely that it shall be *lawful* for the lessor to enter, &c., and that, in the former case, no acceptance of rent or other waiver will set up such lease, but at

(k) See cases collected in Adams's Ejectment, 3d edition, 192 to 197; but *semble*, that the *Nisi Prius* decision in 2 Car. & P. 348; that a notice to quit is a waiver, is not law, Adams, 192, note (d).

(l) *Doe v. Ekins*, 1 Ry. & M. 29.

(m) 3 Coke, 64, b.

(n) 1 Hen. Bla. 5.

(o) 1 Stark. R. 411.

(p) 2 Campb. 520.

(q) 4 Bar. & Cres. 606.

(r) Knowledge of the forfeiture in every question of waiver is a material and issuable fact, 3 Coke, 64, b; 2 T. R. 425, 430.

(s) 3 Taunt. 78; *Doe v. Bliss*, 4 Taunt. 735; *Doe v. Woodbridge*, 9 Bar. & Cres. 376; *Doe v. Bank*, 4 Bar. & Ald. 401.

(t) *Doe v. Allen*, 3 Taunt. 79.

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most constitute a new tenancy from year to year; (*u*) but that, in the latter, a waiver would set up the lease. (*x*) But this distinction only applies to the breach of a *condition*, and not to a breach of *covenant*, for, in the latter case, whatever may be the terms of the clause of forfeiture, and whether it be in a lease for *years* or for *lives*, the act of the lessor may waive the forfeiture, and confirm the lease. (*y*)

In all cases, although the lease declare,* in express terms, that it shall be null and void, it is only in the *option* of the *landlord*, and not of the *lessee* or his *surety*, to take advantage of his own tortious act of forfeiture. (*z*)

Courts of Equity always relieved against forfeitures for *non-payment of rent*; (*a*) though now, when a landlord proceeds in ejectment under the statute 4 Geo. 2, c. 28, s. 2, in case of rent in arrear, and no sufficient distress, and not at common law, a Court of Equity can only relieve within six calendar months after execution has been executed. But Courts of Equity will not relieve against a forfeiture for not insuring, (*b*) nor in any case where the forfeiture has been incurred by a breach of covenant sounding wholly in *damages*, and where the parties cannot be placed in *statu quo*, (*c*) as the breach of a covenant to repair generally; (*d*) and although in one case of the breach of a covenant to expend a fixed sum in repairing the demised premises, Lord Chancellor Erskine relieved against the forfeiture; (*e*) in a subsequent case that decision was treated as going to the utmost verge, if not beyond, the limited jurisdiction of the court. And no relief will be afforded against a forfeiture by breach of a covenant not to assign. (*f*)

7. *Waste* is another ground of forfeiture, though now but seldom proceeded for as such, but rather by action on the case for damages, or as a breach of express covenant. (*g*) 8thly, Forfeitures also affect *copyhold estates* by breach of the *customs* of the manor. (*h*) The cutting timber trees for sale, or otherwise

(*u*) 1 Saund. R. 287, c, d, in notes of Mr. Serjeant Williams; and *Goodright v. Deud*, Cowp. 804; Adams's Eject. 3d edition, 196, 197.

(*x*) *Id.* *ibid.*

(*y*) 6 Bar. & Cres. 519; 4 Bar. & Ald. 401; *Reid v. Farr*, 6 M. & S. 121; 1 Saund. R. 287, n.

(*z*) 4 Bar. & Ald. 401; *Reed v. Farr*, 1 Saund. R. 287, d, note (*g*).

(*a*) 10 Ves. 67; 3 Ves. & Beames, 30; see cases Comyn, Landlord and Tenant, 493; Chit. Eq. Dig. Covenant VII., VIII.

(*b*) 2 Meriv. 459; 2 Price's R. 206, n.,

212.

(*c*) Comyn's Landlord and Tenant, 493; *Bracebridge v. Backley*, 2 Price's R. 200.

(*d*) 16 Ves. 402; 18 Ves. 56; 19 Ves. 141; 2 Price, 209; when otherwise, 2 Meriv. 65.

(*e*) 12 Ves. 282; 9 Mod. 91; but see 19 Ves. 141.

(*f*) 18 Ves. 56.

(*g*) What is *waste*, and what are the remedies, will be presently considered; and see 2 Bla. C. 281.

(*h*) *Ante*, 234, 235; 2 Bla. C. 284; 2 Watkins Copyhold, Index, Forfeiture,

than for repairs, is an act of this nature. (i) 9thly, *Bankruptcy* has been treated as a title by forfeiture by Blackstone; (k) the 6 Geo. 4, c. 16, s. 66, 67, 73, takes from the bankrupt all his estate real and chattels real, and copyhold estate, for the benefit of his creditors, with the exception of the right of presenting to a church vacancy. (l) And 10thly, The *Insolvent Act* contains similar provisions with respect to persons discharged under that act. (m)

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5thly. *Title by Alienation* arises from the *transfer* by one party to another, by *mutual consent of both*, and is effected either, *first*, by written feoffment or DEED; *secondly*, by matter of RECORD, as by private acts of parliament, the king's grants, fines, and common recoveries; *thirdly*, by SPECIAL CUSTOM, as in case of copyhold, by surrender, presentment, and admittance; and *fourthly*, by DEVISE. It will be found that some of these are only used to convey real property corporeal, whilst others, such as grants, &c., are most commonly proper in passing incorporeal rights.

5thly. Title by Alienation. (n)

First. Title by *deeds* are termed the *common assurances of the realm*, whereby it is said (o) (with what truth others will determine) every man's estate is assured to him, and *all controversies, doubts and difficulties are either prevented or removed*. (p) These deeds and instruments operate either as *conveyances*, or as *charges*. Deeds of *conveyance* are, *first*, at *common law*, and include feoffments, gifts, grants, leases, exchanges, partitions, releases, confirmations, surrenders, assignments, and defeazances; *secondly*, deeds of conveyance are under *the statute of uses*, as covenants to stand seised to uses, bargains and sale, lease and release, deeds to lead or declare uses, and deeds of appointment and revocation; and *thirdly*, deeds and instruments which do *not convey*, but *only charge or discharge* lands, are obligations, recognizances, and defeazances. (q)

First. Alienations by feoffment or deed, &c.

There are, however, some other bargains and instruments applicable to real property, which here require to be noticed, such as *licenses* to use or have an easement over land; *awards*, whether by agreement or under inclosure acts, as far as they

Other instruments and modes of alienation.

(i) *Ante*, 234.

(k) 2 Bla. C. 285.

(l) *Ante*, 236, note (z).

(m) 7 Geo. 4, c. 57.

(n) See division, *ante*, 279.

(o) See division, *ante*, 279; and see the various titles by alienation enumerated and considered, 2 Tho. Co. Lit. 223; 2

Bla. C. 287 to 294.

(p) 2 Tho. Co. Lit., 223, note G.; 2 Bla. C. 294. Considering the numerous litigations upon the construction of title-deeds, it might be supposed that this definition were given ironically.

(q) See division, 2 Bla. C. 310.

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affect the title to real property; legal and equitable *mortgages*; *voluntary conveyances*, charges upon corporeal or incorporeal real property, acquired by *judgment* and *elegit*, or *extent*; or by statute staple, or *merchant*, which Blackstone considers as estates upon condition. Jointures and deeds of *settlement* also are instruments materially affecting the interest in land and other corporeal and also incorporeal property.

It is proposed to notice each of these several titles and instruments in proportion to their practical importance, much as when we considered the means of acquiring a title to *personal* property. (r) But *first* we will consider the effect of the statute against *frauds* upon agreements and title-deeds; *secondly*, the conduct to be pursued by a vendor or purchaser, antecedent to the formal conveyance; and *thirdly*, the general rules influencing the choice of the proper conveyance, whether of a legal or equitable interest.

First. How the statute against frauds, 29 Car. 2, c. 3, s. 1 to 4, affects agreements and parol contracts relating to an interest in land, &c.

At common law a *verbal* feoffment or contract, followed by immediate livery of seisin, was a *perfect conveyance* of an estate in fee simple, whereof the party conveying was seised in fee simple, and whatever passeth by livery of seisin, either in deed or law, might pass without deed. (s) But the statute against frauds put an end to all *verbal* agreements and conveyances of *real* property, and even of *chattels real*, by enacting, "for prevention of many fraudulent practices, which are commonly endeavoured to be upheld by perjury and subornation of perjury, that all *leases, estates, interests of freehold*, or terms of *years*, or any *uncertain interest* of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seisin only, or by parol, and not put *in writing* and *signed* by the parties so making or creating the same, or their agents thereunto lawfully authorized *by writing*, shall have the force and effect of leases or estates only *at will*, (t) and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect; any consideration for making any such parol leases or estates to the contrary notwithstanding.

Section 2. Except, nevertheless, all *leases not exceeding* the term of three years from the *making* thereof, (u) whereupon the

(r) *Ante*, 102 to 112.

(s) 4 Cruise Dig. 10, 11; 1 Tho. Co. Lit. 205, 224, note A.

(t) The construction of these words, at will, is, that a parol lease for more than three years is not void, but creates a tenancy from year to year. 8 T. R. 3; 8

East, 165.

(u) And not from a future day, 1 Ld. Raym. 736; but a prospective lease to commence at a future day, and not to extend beyond 3 years is valid, 1 Stra. 631; Bul. N. P. 173; Holt's C. N. P. 47.

rent reserved to the landlord during such term shall amount unto two third parts at the least of the full improved value of the thing demised.

Section 3. And moreover, that no leases, estates, or interests, either of freehold or terms of years, or any uncertain interests, (x) (not being copyhold or customary interest,) of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, be assigned, granted or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting, or surrendering the same, or their agents thereunto lawfully authorized by writing, or by act and operation of law.(x)

The 4th Section enacts, "That no action shall be brought upon any contract (z) or sale of lands, tenements or hereditaments, (a) or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party so charged therewith, or some other person thereunto by him lawfully authorized."

Upon concluding any agreement either to sell or demise, or otherwise relating to real property, corporeal or incorporeal, it is always expedient immediately to have reduced into writing, and signed by each party, the heads of the bargain agreed upon, specifying all particular stipulations as to price and time of payment of rent, &c., and the substance of the bargain, and then concluding with the stipulations that all usual and proper covenants and provisions shall be inserted in the ultimate and final conveyance, lease or deed, and then taking care that such preliminary agreement be duly signed by each party, or by his agent lawfully authorized in writing, so as to prevent the

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Secondly. Expediency of having agreements and covenants preliminary to actual conveyance.

(a) *Uncertain Interest.* A parol assignment of a parol demise from year to year is void, 1 Camp. 318; nor is a parol license to quit, a sufficient surrender of such a tenancy, although the tenant quit accordingly, 2 Camp. 103; nor if the landlord endeavour to re-let, as by putting up a bill, any discharge of the tenant,* 5 Esp. R. 225; 2 Stark. Ev. 590; and the giving an insufficient notice to quit is not a surrender or determination of the tenancy, though it be accepted, 4 B. & Cres. 922.

(z) The word "or" is in the statute, *sed quære* if it should not be "of" or "for."

(a) See the doctrine of specific performance of parol agreements on the ground of part performance, and of equitable mortgages, which seem in contravention of this rule, as it is easy to swear to a ver-

bal agreement to deposit the deeds and charge the estate, 1 Mad. Ch. 537, 558; 4 Mad. Rep. 249; 1 Bro. C. C. 269; 11 Ves. 403; 12 Ves. 197; 5 Esp. R. 105; 5 Esp. R. 103; 3 Young & J. 150, *post*. The words in this section "lands, tenements or hereditaments," are construed to have been used to denote a fee simple, and the others to denote a chattel interest, 5 Bar. & Cres. 839. Thus an agreement to occupy lodgings at a yearly rent, at a future day, and possession not being taken, is an agreement within this section, and should be in writing, 1 Stark. R. 12. As to growing crops, if the crop be of such a nature as would constitute emblements, the sale of it would not be of an interest in lands, but a sale of goods, under 17 sect. 9 Bar. and Cres. 577.

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statute of frauds from impeding either the specific performance, or action, or successfully defending an action for breach of the contract. (b) Every experienced person knows that vendors and lessors, and purchasers and lessees, after having secured their object of selling, buying, letting, or hiring, are too frequently disposed to think that they have agreed to sell or let on too moderate terms, or that they have agreed to purchase or rent at too high a price or rent, and unless they be bound down by a written or signed contract, they are apt to attempt to vary, if not to get rid of the terms: therefore every solicitor is blameable, if he do not, immediately he has been consulted and has settled the terms, take care to obtain a full and explicit signed agreement; and parties themselves would act prudently, when about to enter into any bargain of this nature, to obtain from their solicitors, and well consider what will be a judicious ready prepared agreement for sale or lease, containing at least all usual and proper terms, and capable of being easily altered, according to the final agreement of the parties, so as instantly to be signed before they separate. And as agreements to convey or demise, though under seal, do not require an *ad valorem* stamp, a 35 shillings stamp would suffice. (c) It will be advisable that such preliminary agreement should be under seal, so as to bind heirs as well at law as in equity. (d)

The terms of the preliminary agreement will necessarily vary according to the nature of the property, and the intended agreement in each particular case. The price or amount of the purchase money or rent should be expressly fixed, for a Court of Equity will not enforce an agreement to pay a sum to be fixed by arbitration or by surveyors, (e) and it may be legally stipulated without constituting usury, that if the purchase money be not paid on the precise day, it shall bear more than 5l. per cent. interest. (f) The precautionary stipulations and

(b) As to the necessity for all stipulations being inserted, see *ante*, 118. Sometimes solicitors will attempt to excuse themselves for the omission to have a regular preliminary agreement, by insisting that frequently, by requiring such a preliminary formal contract in writing, parties fly off from their bargain, and that therefore they think it better to wait until they have executed or accepted a conveyance or a lease. But this conduct is frequently very prejudicial to their clients, and they might be sued for negligence, the same as an auctioneer for neglecting

to take a deposit.

(c) 6 Bar. & Cres. 506.

(d) 9 Mod. 106. A covenant under seal for one self and heirs to surrender copyhold, binds the heir, and equity will direct him to surrender, 2 Freem. 109.

(e) 2 Sim. & Stu. 130, 418, 423; 14 Ves. 400. Per Vice Chancellor, "It is quite settled that this Court will not entertain a bill for specific performance of an agreement to refer to arbitration."

(f) 7 B. & Cres. 453, 1 Man. & R. 143, S. C.

measures on the parts of vendors and purchasers, are perspicuously stated in one of the ablest modern publications, and which should be read by every person about to sell or purchase an estate. (g) Some other precautions will be collected from the following observations.

An intended vendor should, before he publishes his intention to sell, have a *perfect abstract* of his title prepared and carefully examined with the deeds in his possession, and in which all the facts, such as marriages, births and deaths, connected with his estate, should be faithfully stated, and he should be well assured of his ability to produce all documents, and verify all facts so stated; and he should then obtain the *opinion* of an experienced conveyancer upon the sufficiency of his title, and upon the expediency of delivering a corresponding abstract, or omitting any, and what part, and also upon the necessity of providing in the particulars and conditions of sale against the production or proof of any deed, or other fact, so as to compel any purchaser to accept a conveyance without the same. (h) A vendor should not advertise, or at least deliver particulars of sale, till he is already prepared to deliver such an abstract; for if after delivery of an abstract, the vendor should have to answer and remove objections reasonably made to the title as disclosed thereby, not only much delay may ensue, but he will have to pay the intervening costs, although he may ultimately succeed in compelling a specific performance. (i)

Supposing that it has been ascertained that the intended vendor can make a good title, then, and not before, should the estate be *advertised* for sale.

With respect to the *advertisement*, and particulars with conditions of sale, it has been judiciously advised not to leave the description of the property to be sold to an auctioneer, who is generally too apt to indulge in luxuriant and sometimes erroneous description. (k) If there be any material misrepresentation it may avoid the contract, or at least entitle the purchaser to compensation and reduction from the agreed price, (l) and terms in an advertisement will sometimes be equal to a contract; (m) we have seen the consequences of a material mistatement in the quantity of the land. (n) The *conditions* must explicitly state all the qualifications of the purchaser's right to require documents, proof, &c. for in general, especially in sales by auction,

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Secondly. Conduct of vendor and purchaser before formal conveyance, as in preparing abstract, taking opinion thereon, preparing advertisement and particulars and conditions of sale, and agreement of purchase.

Advertisement and particulars and conditions.

(g) Sugd. V. & P. Introduction, and see ante, 118, and see post, chap. v.

(h) See some suggestions, Sugd. V. & P. 8th ed. 12; 1 Jac. & W. 623.

(i) 1 Jac. & W. 623, 624.

(k) Sugd. V. & P. 8th ed. 12; and Introduction, *per tot.* and 283 to 294.

(l) Id. *ibid.*, and see 1 Russ. & M. 128.

(m) Knapp's Rep. 344.

(n) *Ante*, 180, 181.

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such *conditions* form the basis and terms of the contract, because it is usual for the purchaser merely to sign a short memorandum at the foot of the conditions, agreeing to purchase on those terms, and there is not time to prepare a more explicit agreement, as in the case of *private* sales.

If it be apprehended that there will be the least difficulty in establishing any particular part or parts of the title, the right to require proof thereof should be expressly provided against either in the conditions, or by a more formal agreement, to be signed by the purchaser, so that he may, by his own express contract, be precluded from requiring the production or verification of documents or other facts, which the vendor thinks he will not be able readily to produce or establish. (o) It would be as well also to stipulate that the expense of tracing and vesting in any legal representative any outstanding term, if required, shall be at the expense of the purchaser, and not excuse any delay in paying the purchase money, for without such stipulations no purchaser is bound to accept a title, unless he gets either the title deeds themselves, or documents or covenants which would entitle and enable him to enforce the production of such deed; (o) and if a vendor retain the title deeds and covenant for further assurance, the purchaser may, under that covenant, compel him to enter into a covenant for the production of the deeds; (p) and if there be no stipulation providing for accident, a purchaser is not bound to accept the title when the title deeds have been destroyed by fire, although after they had been examined with the abstract. (q) And if the title deeds relate to other estates, it should be expressly provided that the vendor shall only give copies, at the expense of the purchaser, and shall not be required to produce the originals, except in certain specified events, for an express or implied general covenant to produce deeds runs with the land, for the benefit of sub-purchasers, though not for the benefit of vendors. (r) And the non-performance of it, when unqualified, might subject the vendor and his heir, or assignee of his retained land, to successive litigation.

It should be further stipulated, whether or not upon any and what terms the purchasers shall be forthwith at liberty to take possession before completion of the purchase, without preju-

(o) *Barclay v. Raine*, 1 Sim. & Stu. 464, 465; 1 Jac. & W. 263, 623.

(p) 2 Sim. & Stu. 533.

(q) 4 Russ. R. 1. And yet if a house purchased in fee be burnt after the sale,

the purchaser must bear the loss. Sugd. V. & P. 255; he should, therefore, insure immediately after the agreement of purchase has been signed.

(r) 1 Sim. & Stu. 449.

dice and without precluding him from afterwards objecting to the title; (s) also providing that no trees or underwoods shall be cut, nor waste, or any alteration of the premises made before the purchase has been completed; and that, in the event of the purchase not being completed, possession shall be restored, and certain mesne profits or stipulated damages, proportioned to the time of occupying, be paid or allowed to the vendor, and on the other hand, the interest on the deposit and purchase money, kept unproductive, shall be allowed to the purchaser.

It should further be stipulated whether precise performance on each side on the appointed day for completion shall be peremptorily insisted upon; (t) and it is even legal to stipulate that more than 5 per cent. interest shall be paid in case of delay in paying the purchase money; (u) and it should be stipulated how the house or land or business or farming shall be managed, as well before that time, and at whose expense, and what compensation shall be made by the party who should not complete the contract. (x) If there be a sale of several lots, it may be advisable to stipulate that a defect in the title of one or more, where several lots are purchased by the same party, shall not affect the contract of purchase as to the others; (y) and there may be an apportionment of rent in such case. (z) It is also usual to provide that misdescriptions, if any, of a specified or other trifling nature, shall at most entitle the purchaser to moderate deduction, and not invalidate the sale. An agreement for a sale, though not under seal, passes no legal interest, but only entitles a party to call for performance of that agreement in a Court of Equity.

A purchaser who has property in the funds, or any other property which the vendor may be willing to take in exchange, or as a mode of paying the purchase money, should stipulate for that mode of paying, by which he would avoid the necessity for paying the *ad valorem* duty. (a) He should also stipulate in the agreement what covenants shall be introduced, if he resolve to

(s) 3 Russ. R. 171. Without such a stipulation or understanding, the taking possession might be treated as a waiver of a strict title, Sugd. V. & P. 16, 107, 233.

(t) *Ante*, 120.

(u) 7 B. & Cres. 453; 1 Man. & Ryl. 143, S. C.

(x) 1 Sim. & S. 122; 2 Id. 393.

(y) 3 Sim. 29; 1 Russ. R. 325; 1 Russ. & M. 29; but this is not in general necessary, Sugd. V. & P. 268, 270.

(z) 1 Jac. & W. 181, 426.

(a) The 55 Geo. 3, c. 184, schedule, tit. "Conveyance," and "Exchange," only applies to sales, and affects the purchase money, and does not seem to extend to exchanges, excepting as respects money paid for equality of exchange, 7 B. & Cres. 392; 4 B. & Cres. 243; 6 B. & Cres. 234. The opinions of three of the most eminent conveyancers to that effect are in the possession of the author.

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have any that are not *usual*, such as an absolute covenant for good title, not (as usual) only against acts of the vendor; also how the premises shall be cultivated until the conveyance shall have been executed; also that the deposit money shall not remain unproductive in the hands of the auctioneer, but be invested in the most productive public funds, and at whose risk as to rise or fall; or else the payment of interest should be provided for; (b) because, however considerable the deposit may be, and however long the ultimate conveyance may be delayed, the auctioneer will not be liable to pay interest, although he may in fact have derived great profit from the use of the money. (c) Any deterioration of the estate before the conveyance has been executed should also be provided for. (d) In the absence of an express agreement to the contrary, a purchaser who has not been in possession is bound to pay interest on the purchase money, and take the rents and profits only from the time when a good title is first shown, and not from the time fixed by the agreement for the completion of the purchase. (e) And where a contract of purchase contained a stipulation that if by reason of an unforeseen or unavoidable obstacle the conveyance could not be perfected for execution before the day fixed for the completion of the purchase, the purchaser should from that day pay interest at 5 per cent. on his purchase money, and be entitled to the rents and profits of the premises, and the vendor did not show a good title till long after the specified day, it was held that he was not entitled to interest except from the time when a good title was first shown. (f)

Abstract.

The vendor will be enabled, by adopting the beforementioned precaution of examining and taking advice upon his title before he actually sells, immediately after the signing of the contract, to deliver a clear and perfect *abstract* of the title, as already advised upon, which will avoid any imputation of delay against him, and probably much expense and loss. (g) Thus where the title in the abstract was not satisfactory, and the purchaser on that account refused taking possession, although finally a specific performance was decreed, yet it was on the terms of the vendor accounting for the rents received, or which, without his wilful default, might have been received: (h) and it is incumbent on the vendor seeking a specific performance, and still more suing at law, to show that he had his title prepared,

(b) 1 Sim. & Stu. 122; 2 Id. 393.

(c) 1 B. & Adolp. 577.

(d) 1 Sim. 530.

(e) 4 Russ. R. 118.

(f) Id. 121, 122.

(g) *Ante*, 295; Sugd. V. & P. 12.

(h) 1 Jac. & W. 36.

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and sent a proper abstract of it in the first instance and in due time to the purchaser, and that he answered all reasonable inquiries on the part of the purchaser within a reasonable time after the same were made; and therefore where the abstract delivered was imperfect, it was decreed that the vendor should pay the costs up to the time of the defects being supplied. (i)

A purchaser of a share in a copartnership business, and in freehold, leasehold, and copyhold lands, does not waive objections to the title by taking possession of the property and acting as a partner, where the contract stipulated that a good title should be made by a specified day, and it appeared to have been the intention of the parties that the purchaser should *immediately* and before that day have the possession. (h) It is better however in the agreement of purchase to insert express stipulations to the same effect, and also to regulate the terms of possession in case the contract should not be completed. (h)

Purchaser's taking possession before conveyance.

If a purchaser of a lease and stock of liquors, furniture, and goodwill of a public-house improperly object to complete the purchase, he will be compelled to do so, and will be charged with rent, taxes, and other outgoings paid by the vendor from the time when he ought to have completed, and also with the purchase money and interest from the same time; and if the vendor be obliged to keep open the house to prevent the loss of the goodwill of the trade, the purchaser will not be entitled to any rebate or allowance for occupation rent for the use of the house and furniture by the vendor between the time when the contract ought to have been and the time when it really was completed; but that the purchaser was not liable to purchase any fresh or substituted stock of liquors, &c., or to pay any losses in the trade. (l) In such a case it seems at least advisable for the vendor to give the purchaser notice of the necessity of carrying on the business or the cultivation of the farm, &c.; and that if the purchaser will not take possession, the vendor must carry on the same, and at the risk of the purchaser. (m) It is better to stipulate expressly for such an event. (n)

Purchaser's improperly refusing possession at time appointed, and proceedings thereon.

At law, in an action against a purchaser for not completing a contract of purchase, the question is, whether the offered title was strictly and substantially perfect? (o) But a Court of Equity will not, unless otherwise specially agreed, enforce spe-

(i) 1 Jac. & W. 623.

(k) 3 Russ. R. 171.

(l) 2 Id. 170.

(m) See suggestions in 2 Russ. Rep.

179, 180.

(n) See 2 Russ. R. 181.

(o) 7 Bing. 379; 8 Bing. 326; 6 Bing.

121.

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Agreement for
lease.

cific performance, if the title may give rise to a contest at law, or be doubtful, though it might after discussion at law be holden sufficient. (p)

In preliminary agreements for leases, it is better to enumerate particularly in concise terms all the intended stipulations and covenants, (q) and they may be arranged under several enumerated heads, as in the form in the note. (r)

Under the words "with *all usual and reasonable covenants*," a covenant not to underlease or assign will not be implied, and cannot be insisted upon by the lessor; (s) and where there has been an agreement by brewers to grant a lease of a public house with all usual covenants, it should seem that a covenant to buy all beer of the lessors is not an usual covenant. (t)

Agreement to
secure money
on mortgage
and mortgage
lands, &c.

It frequently occurs that before a *formal mortgage or charge* upon property has been made, there is a preliminary agreement, and which is extremely essential for the security of both parties, for if there be no stipulation in writing to advance the money, the intended mortgagee might ultimately, without adequate reason, decline to make the promised advance, and the proposed mortgagor would have no remedy for the disappointment and expense he had incurred; and on the other hand, the agreement should stipulate, that in case the proposed security should not, in the opinion of one or more conveyancers, be sufficient *in title*, or upon a survey, at the expense of the intended mortgagor, be inadequate in *value*, or the bargain should fail to be completed, without fault of the proposed mortgagee, then the intended borrower shall pay all reasonable expenses and interest on monies provided and kept unpro-

(p) *Id.* *ib.*; 1 Jac. & Walk. 169; *Sharp v. Adcock*, 4 Russ. R. 374. See further, Eq. Dig. tit. Leases, VII. 620; Covenant, post, chap. viii. as to *specific performance*. (q) See in general, *ante*, 118; 1 Chit. V. 259.

Suggested form
of an agreement
for a lease.

(r) Memorandum of an agreement made this — day of — A.D. — between A. B. and C. D. for executing and accepting a lease of a farm, buildings and land, with the appurtenances of said A. B. in the parish of — on the following terms: 1. *Premises* as aforesaid, messuage, buildings, land, containing at least — acres, with common appurtenant and ways at any time heretofore used with said premises, (trees, woods, underwoods, game and fisheries, and liberty to enter to hunt, shoot and sport for same excepted). 2. Term, twenty-one years from Lady-day last, determinable at option of either party, at expiration of first seven or fourteen years, on giving half-year's previous notice.* 3. Rent, £ — per annum, payable quarterly, free from any deductions, except land tax. 4. Covenants to pay rent and taxes, except land tax and sewers' rate, to repair, and keep and leave in repair, (damage by fire and tempest, or acts of incendiaries excepted). *Husbandry* covenants as follows: [*here enumerate heads of special stipulations*]. Lease to contain all other usual and proper covenants. Signed, A. B. and C. D. Witness to signatures, E. F. and G. H.

(s) 12 Ves. 179, 186; 3 Bro. C. C. 632; might be implied, unless the custom of the country were generally against it. 15 Ves. 528, 258, 264. But see 3 Anst. 700, where it was held that such a covenant (t) Peake, Rep. 131.

* Unless especially provided, the option is at law and in equity only in lessee, 3 Bos. & Pul. 399, 442; 17 Ves. 563.

ductive, or that the money should, pending the investigation of the title, be vested in some productive fund. In general, in a Court of Equity, where there has been an agreement to grant a rent charge or other security, even on particular lands, the engagement will be construed to have been effectually to charge every other land of the party agreeing, in case the title to the particular land should turn out defective, and performance will be decreed accordingly, but it is advisable for a mortgagee to require a specific covenant to that effect. (u)

2. *Requisites of Conveyances in general.* We cannot here assume to consider all the requisites of deeds of conveyance or lease even in general, and can only refer to the general works and notice a few material recent decisions not perhaps to be found in other treatises. (x)

2. Requisites of conveyances in general.

In describing the *premises* in the *conveyance*, it is advisable, especially when the estate is copyhold, or intermixed with copyhold, to preserve the ancient descriptions, and if there has been any alteration or fresh survey, to add a very minute and accurate modern description, (y) as thus, “heretofore known and described as, &c. (stating the old description,) and as containing by estimation — acres more or less, but now more commonly called and known by the name and description of, &c. and containing by recent admeasurement — acres statute measure.” We have further considered the expediency of ascertaining whether a supposed right of common, or any other easement, the benefit of which the purchaser intends shall be included in his purchase, has not been extinguished by unity of seisin, and if there be the least doubt, then not only to insert the usual description of all appendants and appurtenances, but a fresh express grant of such common, or way, &c. and to add, and “all commons, ways, &c. now or heretofore usually had, *used or enjoyed*, with the principal property conveyed, or any part thereof.” (z) It has recently been decided, that a conveyance of a messuage, with all ways thereto appertaining or *belonging*, would not pass a way used with the premises, but which had been extinguished by unity of seisin, the word “*belonging*” being synonymous to “*appertaining*,” and not equivalent to the term *used*. (a)

(u) 1 Sim. & Stu. 612, 621.

(x) See in general Com. Dig. Fait.; Sugd. V. & P.; 3 Bla. Com. with the notes, 295 to 344; Preston on Conveyancing; Cruise's Digest.

(y) *Ante*, 237, note (l); 4 Russ. R. 267; 7 Bar. & C. 243.

(z) *Ante*, 156, 157.

(a) *Barlow v. Rhodes*, K. B. Hil. T. 1833.

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I. RIGHTS
TO REAL
PROPERTY.

Conveying
words.

Deeds having
several opera-
tions, and who
to elect how it
shall operate.

As a deed may operate various ways, and on different estates and interests in the same property, conveyancers usually insert various terms, to enable the grantee to elect to take the estate by various means, and this seeming superfluity of words is therefore still recommended. *(b)*

A deed or proposed conveyance, when executed, may operate in various ways, and he to whom the deed is made shall have the election which way to take it, and may take it in that way as shall be most for his advantage; *(c)* and therefore if a man for money demises, grants, bargains and sells his land to *J. S.* for years, the latter has his election to take it either by demise at common law, or by bargain and sale, *(d)* but such election must be made by the party to the deed, and not by a stranger, *(e)* therefore unless it be averred that in fact *J. S.* entered so as to perfect the estate for the term under the demise, he had merely an *interesse termini*, unless it be averred and proved that *J. S.* elected to take the term as under a bargain and sale, and operating under the statute of uses, *(e)* and therefore where a defendant in replevin made cognizance under a power of distress, for an annuity granted by *G. T.* to *H.* in Sept. 1806, and the plaintiff pleaded that previously, viz. in May, 1806, said *G. T.* for securing another annuity, and in consideration of 3,000*l.* granted, bargained, sold and demised the premises in White Acre to *F.* for 99 years; this was held no bar, without alleging entry by *F.*, so as to make the demise for 99 years operate and pass that term as a lease at common law, or that *F.* elected that the deed should enure by way of bargain and sale. *(f)* Deeds are to be construed and be given effect to, if possible, so as to effectuate the intent of the parties, *(g)* and where a double purpose is intended, and the words are large enough, such double purpose may be carried into effect; as where the same lease and release were held to pass not only a reversion in fee, but also a term out of which a shorter term had been carved, so as to entitle the vendee to receive the improved rent payable by the sub-lessee, and *not* to merge the intermediate term in the reversion in fee. *(h)* In pleading a deed containing several words, and which might operate various ways, the pleader should, when the sense and legal operation is clear, state such operation accordingly, *(i)* but when the legal opera-

(b) *Ante*, as to the double operation, and note, 151, 152; 1 Preston on Abstracts, 93.

(c) Shep. T. 83; 8 Bing. 106.

(d) 2 Coke, 35, b.

(e) 8 Bing. 106.

(f) 8 Bing. 92.

(g) Shep. T. 87; Willes, 327.

(h) 7 Bing. 761.

(i) See 2 Saund. 976; 1 Chit. Pl. 334 to 336.

tion is uncertain, then it seems to be the safer course to state that part of the deed verbatim. (*k*) In the latter case, however, it is necessary to aver such facts as were essential to completely pass the legal interest, as an entry of the lessee, or his election that the lease should operate as a bargain and sale. (*l*)

To constitute a deed, it must have been *delivered* as such; (*m*) but a *signature* is not essential, unless in cases under the statute against frauds, and in deeds executed under powers; (*n*) and a release, to be effectual, need not be *signed* as well as sealed. (*o*)

In a conveyance of corporeal or incorporeal property, the *estate* or interest passes though a trustee do not execute, or only one of them; for it is a legal *inference* that all deeds, whether deriving their effect from the common law or the statute of uses, do, immediately upon their execution by the grantors, divest the estate out of them, and vest or put it in the party to whom the conveyance is made, though in his absence and without his notice, till some disagreement to such estate appear. (*p*) If, however, neither trustee executed or assented, but dissented, it might be otherwise; (*q*) and if a debtor, with a view to delay an execution creditor, or his creditors in general, were to execute such a conveyance, and the grantee do not in fact accept the benefit of the conveyance, it should seem that the same might be treated as inoperative; and in such case no formal disclaimer by deed would be necessary, though where one trustee accepts, and the other not, disclaimer by *deed* might be advisable. (*r*) And it was on these principles held that where an insolvent, by a composition deed, conveyed to four trustees, upon trust to sell and apply the proceeds rateably in discharge of his debts amongst all his creditors who should execute the deed, provided that the trustees and creditors should, on a named day, make proof of their debts, if required, and *execute that deed*, and the creditors thereby, as a release of their debts, covenanted not to implead the insolvent, and the deed was executed by only two of the trustees, it was held that the deed was not therefore void, and that the debt of a trustee who had executed it was thereby extinguished, and that he could not sue out a commission of bankruptcy, the property being vested in the two trustees. (*s*) A conveyance, like other

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Signature and sealing of the parties, and consequences of all grantors or parties not executing.

(*k*) Per Abbott, C. J. and Bayley, J. in 3 B. & Ald. 69, 70; 1 Bar. & C. 358.

(*l*) 8 Bing. 92, 106.

(*m*) 2 East, 257; Com. Dig. Fait, G. As to *escrow*, see 6 Taunt. 12, *infra*, 304, n.

(*n*) 17 Ves. J. 459; Com. Dig. Fait, B. 1.

(*o*) *Taunton v. Peplea*, 6 Mad. Rep. continued by Geldart.

(*p*) 4 Cruise, 12; Gilb. Uses, 224, 505; and see reasons, Com. Dig. Fait, G. ed. by Hammond; 2 Vent. 201; 3 Mod. 296.

(*q*) *Small v. Marwood*, 9 Bar. & Cres. 300; 4 Ves. 97.

(*r*) As in 4 Ves. 97; 9 Bar. & Cres. 307 to 309; and see 3 Bar. & Ald. 31, as to disclaimer by *deed*.

(*s*) 9 Bar. & Cres. 300; 4 Ves. 97.

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Consequences
of mistakes and
alterations.

deeds, may be delivered as an *escrow*, but the bargainee cannot be divested of the estate if he afterwards duly perform his part. (t)

Although any material alteration in a deed, without a party's concurrence and after it has been executed, will invalidate the deed, and preclude any person from suing him thereupon, (u) and also render a fresh stamp necessary; yet, as far as respects the *transfer* of *estates*, or interests in *real* property or chattels real, it equally passes as if there had been no alteration, and remains in its former state; and therefore, where a deed of conveyance, under which the lessor of the plaintiff claimed title to certain soil, in an action of ejectment, was proved after it had been executed to have been altered in a material part, it was held that although the deed was thereby rendered wholly inoperative and void, yet that as the estate which originally passed by it *remained vested*, the deed ought to be admitted in evidence. (v) So the filling up the blanks in a deed after it has been executed by the conveying party will not prevent the estate from passing. (x) So where by mistake a conveyance had been executed to certain uses therein expressed, and which were afterwards by another deed revoked, and different uses declared by another deed, the latter was held inoperative, because the estates were already vested by the first deed; and it was held to be necessary to resort to a Court of Equity to compel the parties in whom the interest had vested to convey such interests to the new uses. (y) And the defacing or cancelling a deed will not in any case divest property which has once passed; (z) and this is one reason why mere cancelling a lease will not operate as a surrender. (z)

Custody of abstract and drafts of deeds.

Whilst the contract of sale or mortgage is open and proceeding, the *abstract*, though prepared by and at the expense of the vendor, is the property of the purchaser, and he might maintain trover for it against the vendor; but after the sale has been broken off, it, as well as any opinion thereon, is the

(t) 6 Taunt. 12; and see 2 Ves. & B. 148; 9 East, 360.

(u) Com. Dig. Fait.; and see 1 Bar. & Cres. 682, as to the effect of alterations at common law; and under stamp act in general see Chitty on Bills.

(v) 4 B. & Ald. 675; 2 Bla. C. 308, n. 25; and see per Holroyd, J. in 3 Stark. Rep. 60, 61, note. In 4 Bar. & Ald. 675, Holroyd, J. stated that to be the rule of law, and that a most material alteration, after the principal conveying party of the legal interest had executed, but before the other parties executed, did

not prevent the deed from passing the estate; and Lord Tenterden and Bayley and Littledale, Js. concurred. But see distinctions in 2 Tho. Co. Lit. 233, note 13, as to fraudulent alterations by a party to whom a conveyance has been made.

(x) 5 Bing. 368; 2 Moore & P. 663, S. C.

(y) 3 Taunt. 342, 376; 3 Russ. 399.

(z) 2 H. Bla. 263; 4 Bar. & Ald. 675; and see 1 Bar. & Cres. 682, as to breaking off the seal of one of several parties.

property of the vendor, for otherwise his title might, at any indefinite time, be exposed to strangers; (a) and, for the same reason, no copy can in that case be kept by the purchaser. (a)

The *drafts of conveyances and deeds* prepared at the expense of the purchaser belong to him and not to his attorney, unless he have a lien, and then only until it has been satisfied. (b)

At present the necessity for *registering* conveyances and incumbrances on estates is confined to particular counties, as Middlesex, certain parts of Yorkshire, and Kingston-upon-Hull. (c) It would be beyond our present purpose to discuss the expediency of extending the local provisions to the whole of the United Kingdom. It should seem essential to prevent a *second* charge, for no indictment for fraud in obtaining money by a second transfer or mortgage, concealing a prior incumbrance and even covenanting absolutely, is sustainable. (d)

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Registry of
deeds, and
notice thereof.

We have seen that the statute against frauds now requires a *writing signed* in all cases, though at common law a *parol* contract of sale accompanied with livery was valid; (e) the statute however neither at law nor in equity makes any difference in *pleading* a feoffment or other writing whatever, either in a declaration (f) or bill in equity. (g)

Thirdly. The several sorts of deeds or modes of conveyance, charge or license, in general.

It has always been necessary to have a *grant* or demise under seal to pass any *interest* in *incorporeal* things lying in grant and not in livery; (h) and a *parol* license could not at common law, still less since the statute against frauds, pass any *interest* in any thing *incorporeal*; (h) and therefore it has been held that in case of a lease for a term of years of *tithes*, (i) or of a *several fishery* in an arm of the sea, that not being a territorial possession, (k) will not, without instrument under seal, vest any legal interest in the grantee. So where a rector demised his *tithe* by instrument not under seal, it was held that the lessee could not be deemed the legal owner or occupier so as to be rateable to the poor, and that therefore the lessor must be considered to be still the owner and occupier. (l)

First. When a deed is necessary.

No no *freehold* interest in *land* or other corporeal property,

(a) 2 Taunt. 276, 278; Sugd. V. & P. 386, 387.

(b) 7 Bar. & Cres. 528.

(c) Sugd. V. & P. 8th ed. 693, 484, and Index, tit. Register; 2 Bla. C. 343, 344.

(d) *Rex v. Codrington*, 1 Car. & P. 661. As to clandestine mortgages, 4 & 5 W. 3, c. 16; Chit. Col. Stat. 389, and notes; and see 5 B. & Ald. 142.

(e) *Ante*, 292, 293.

(f) 1 Saund. 211, note 2; 276, note 1, 2; 1 Chit. Pl. 254, 332; but *quære* in a plea, *Id. ibid.*; Raym. 450; Steph. 2 ed. 418, 419.

(g) 1 Sim. & Stu. 543.

(h) 7 Bing. 687, 691; 5 B. & Cres. 221, 875; 8 Id. 293; 9 Id. 479; 4 Man. & Ry. 427; *ante*, 220.

(i) 9 B. & Cres. 479.

(k) 5 Id. 875.

(l) 9 Id. 479; *ante*, 220.

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as for the term of life, can be effectually created without deed; (*m*) and therefore it was held that a demise from year to year, determinable only at the option of the tenant, was void, because it amounted to a lease for his life, which, being a freehold interest, could not pass without deed. (*n*) And on the same ground it was held that a parol license, though for adequate consideration, by the rector to a person to erect a vault, and that the party shall have the sole right of burying therein, is inoperative for want of a deed, and revocable at pleasure; so that the latter could not sue the former for introducing the body of another person into the vault. (*o*)

Another rule is, that no *common law* conveyance, as a feoffment, can pass a freehold estate to *commence in futuro*, unless by remainder or reversion. Thus a common law conveyance to *B.* to hold to him and his heirs from Michaelmas next, or from the end of three years, is void; though such a conveyance to hold immediately to *A.* for the term of three years, and from the expiration of that time to *B.* for ever, then the conveyance will operate accordingly. (*p*) But deeds operating under the statute of uses, such as bargain and sale, covenant to stand seised, or a conveyance to uses, or even a devise, may give an estate of freehold to commence *in futuro*; as a *bargain and sale* to *A.* and his heirs from and after Michaelmas day now next ensuing, is good, and the use in the mean time results to the bargainor or to his heir. (*q*)

Another rule is, that no *reversion*, even after a tenancy from year to year, can pass without deed. (*r*)

We may here notice another general rule, that conveyances to uses are to be construed the same as common law conveyances. (*s*)

We shall, when considering parol and other *licenses*, find what exceptions have been allowed in their favour from these rules. (*t*) In the instances where a deed is essential to create an *interest* or continue a *right*, we shall observe that the instrument, however imperfect, will, until countermanded, so far operate as a license as at least to render what the party *has done* under it lawful or excusable; and perhaps, if *suddenly* prohibited from continuing to enjoy the property or easement, he would be entitled to emblements.

(*m*) 8 East, 167; 7 Bing. 688.

(*n*) 8 East, 167.

(*o*) 5 B. & Cres. 221, 875; 8 Id. 288, 293; 9 Id. 479; 8 East, 167; 7 Bing. 687, 691.

(*p*) 2 Bla. C. 165.

(*q*) 2 Prest. Conv. 157; 1 Saund. Uses & Trusts, 128; 2 Id. 98.

(*r*) 7 B. & Cres. 243.

(*s*) Willes, 180.

(*t*) Post, 336, 337, tit. "Licenses."

With respect to the choice of the particular mode of conveyance or *kind* of deed, there are no certain general rules to be followed by conveyancers, but it must in each particular instance depend upon the peculiar circumstances, and more especially with reference to the nature of the subject-matter of the conveyance and of the title of the party conveying, and whether he has the legal or equitable estate, and whether it is in possession, remainder, or reversion, and whether the interest in it be vested or contingent. In treating of the several conveyances we shall have occasion to consider their propriety as connected with many of these facts.

The same modes of conveyance are to be adopted to pass an estate by way of *mortgage* or in *settlement* as if it were an *absolute* conveyance, with the exception of the difference in mortgage deeds of provisos for redemption, and covenants for repayment of money advanced, and for title, the latter of which are more general, and not limited to the act or omission of the grantor.

In conveyances of *equitable* interests or of equities of redemption of mortgages in fee, (*u*) subject to the prior charge, the difference arises principally from the circumstance of the legal estate not being in the party conveying, and the rule that a person cannot be seised of an equity to a use. Where the equitable interest is intended to be conveyed to the party in *possession*, in whom the legal estate is or is supposed to be vested, a release alone is sufficient, operating at common law, or by mere contract or grant; but where such interest is to be transferred to a *stranger*, the proper and formal mode of effecting such object would be either by assignment, or grant, or by devise. Such an interest cannot be conveyed by feoffment or bargain and sale, nor, strictly speaking, by lease and release. But both in this and the former case it is most usual, in practice to adopt the conveyance by *lease and release*, for this reason, that in case there should be any freehold estate or interest left in the mortgagor, then the bargain and sale or lease for a year would operate on such estate, and with the release pass that also; and if there should not be, then the release would operate as a common release to pass the equity. But in the latter case, of a conveyance of the equity to a stranger by lease and release, it would, it is apprehended, be advisable, after the word release (in the latter deed), to superadd words of assignment, so as to give a corresponding double operation.

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Secondly. Of the general rules influencing the choice of a particular mode of conveyance.

(u) An equity of redemption on a mortgage for years is like a reversion in any other person, to be conveyed as any

other freehold expectant on a term, whether by lease or otherwise; 7 Bar. & Cres. 243.

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1. Common Law Conveyances.—The principal conveyances at common law were by feoffment and grant; the former applicable to corporeal, the latter to incorporeal property. With respect to corporeal property, the leading feature which distinguishes the feoffment or conveyances at common law from those which derive their effect from the statute of uses, is this, that in conveying by feoffment, the principal and most material fact to be attended to is the actual delivery of seisin or possession in fact, by the party selling to the party buying, which must be done either by the parties themselves in person, or by some person duly authorized by regular power of attorney, consequently rendering it necessary that the parties or their agents should be actually present upon the land sold and intended to be conveyed. But in respect of those conveyances the operation of which depends upon the statute of uses, it is quite different, for it is not necessary that either of the parties, or any person by their authority, should be upon the land, or should ever have seen the property which forms the subject-matter of the conveyance: and thus an estate in Yorkshire, of ever so great value, may be conveyed by one party to another in London, or at any other great distance. (x)

1. Feoffment.
(y)

1. A *Feoffment* with livery of seisin, excepting from the inconvenience of livery of seisin, is the best mode of conveying real property corporeal of small value, and the title to which is merely long possession exceeding twenty years, or is shown by a clear lineal descent from grandfather to father, and from father to son, and which is not encumbered by outstanding terms, and of which the vendor himself being in possession may readily, in the presence of several witnesses, deliver seisin to the purchaser. And if a tenant for years and not for life be in possession, the lessor may, with the consent of the tenant, convey the fee by feoffment and livery of seisin. (z) And it should seem, that when there is an outstanding term, the fee may nevertheless be conveyed by feoffment, and the term by distinct assignment to a trustee. (a) A feoffment by *deed* to a near relation and his heirs, but without livery of seisin, will be construed and given effect to as a covenant to stand seised. (b)

(x) See 2 Sand. on Uses and Trusts, a work which cannot be too deeply studied.

(y) See in general Com. Dig. Feoffment; 2 Bla. C. 309 to 327; Tho. Co. Lit. Feoffment, and see form, 2 Bla. C. Appendix.

(z) Watkins' Conv. 161; and see 7 Bar.

& Cres. 247, 248; 2 Bla. Com. 315; post, 318, n. (g). Surrender.

(a) 2 Scho. & Lef. 73; and 3 Bar. & Cres. 383; Sugd. V. & P. 274, note I.

(b) 2 Ves. Jun. 226; 4 Bro. C. C. 353; 1 Vern. 40, 141.

But the trouble of the vendor attending on the premises to deliver seisin, and the risk of being unable to prove livery of seisin at a future time, and the circumstance of no expense being saved on the stamp, generally induce conveyancers to prefer a conveyance by lease and release, which contains words, and is capable of operating in various ways in favour of the purchaser. Where, however, a deed of feoffment has been followed by possession, a jury ought to presume the livery of seisin to have been made. (c) In stating a feoffment, whether in a declaration or a plea, it suffices to allege that *A. B.* enfeoffed *C. D.* without alleging livery of seisin. (d)

Though feoffments are not so frequently in use as conveyances under the statute, yet they are frequently adopted, where, by their tortious operation, they may have an effect not to be produced by the latter, as, for instance, in barring or destroying contingent remainders, future uses, and powers, in clearing disseisins, &c., and otherwise in curing defective titles.

2. and 3. *Gifts and Grants* are distinguished only by the term *give* being introduced into the deed when the conveyance is *gratuitous*, and which expresses rather the motive of the party conveying than any particular description of conveyance, for, in other respects, the terms are the same as in any other conveyance, which may equally well operate as and be termed a gift, if it be not for *valuable consideration*. A grant is either by indenture or *deed-poll*, by which the grantor conveys some property, (usually *incorporeal hereditaments*, (f)) such as common of pasture, an advowson, (g) exclusive use of light and air over a man's land, or the use of flowing water, (h) a several fishery in a navigable river, and tithe; interests in which, we have seen, can only be created by instrument under seal; they not being capable of passing by livery of seisin, and lying only in grant. (i) So a deed is essential to create or pass a *freehold right*, as for term of life, in any easement. (k) A grant under seal also is a *proper conveyance* to a stranger without livery of a *reversion*, expectant on the determination of a tenancy for years, or from year to year, and without a lease and release, which are not essential, though generally adopted. (l)

2. and 3. Gifts
and grants. (e)

(c) See 2 Bac. Ab. Feoffment, 648.

(d) 1 Chit. Pl. 253; 2 Saund. 305, note 13; Co. Lit. 303, b.; Cro. Eliz. 401; Cro. Car. 101.

(e) See in general 2 Bla. C. 316, 317; Tho. Co. Lit. Grant; Com. Dig. Grant.

(f) 7 Bing. 691; 5 B. & C. 221, 875, Tithes; 9 Bar. & Cres. 478; 8 Bar. & C. 293.

(g) Com. Dig. Grant.

(h) 7 Bing. 691.

(i) Id. ibid.; ante, 203, 204.

(k) 5 Bar. & Cres. 221; 8 B. & C. 293.

(l) Doe v. Cole, 7 Bar. & C. 248, 249; *sed quare* whether, by consent of the tenant in possession, a feoffment might not be made to a stranger, *Id.*, Watkins on Convey. 151; *post*, 318, n. (g).

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All lands and *corporeal* hereditaments lie in livery or in grant, and they do not lie in livery when the party intending to convey cannot give immediate possession. When, therefore, lands are in possession even of a tenant from year to year, the landlord cannot strictly (excepting by his consent *(m)*) convey by mere feoffment and livery, for he is only a reversioner, and he may therefore, without lease and release, and by mere deed of grant, convey his reversion, for his estate properly lies in grant. *(n)* Conveyancers prefer a *lease and release* in all cases, because those modes of conveyance operate in all ways, and contain words to pass estates in possession as well as in reversion; *(n)* and another reason for adopting the lease and release is, that there is then no necessity for adducing proof that there was a particular estate or term in existence to make it a remainder.

A grant at common law is an innocent not a tortious conveyance, and passes only such an estate in the property conveyed as the grantor may lawfully have, and consequently will not cause a forfeiture. *(o)*

A grant is generally used for the purpose of passing incorporeal hereditaments, which may be also, it is observable, conveyed by surrender, lease and release, and bargain and sale, without the word "grant," and hence it is said that any other words which show an intention to pass the property will be equally efficient: but this must be understood with reference to those conveyances which will, if perfect, pass the same, but not as a grant; and, if there be any defect in them, so that they could not have their ordinary operation, if the subject-matter were corporeal hereditaments, then, if the word "grant" be omitted, they will not operate as such upon incorporeal property intended to pass. *(p)*

But although a grant not under seal does not operate to pass an interest in the cases before noticed, yet it will be equivalent to a *license*, and excuse a trespass done under colour thereof, and before countermand. *(q)*

4. Leases. *(r)*

4. *Leases.* We have already considered the estates or interests for years, and from year to year, usually created by leases or demises; *(s)* and we have seen that even the latter is deemed to be an estate for years; *(t)* and that, though the lease be for 1000 years, or perpetually renewable, yet it is, in legal estima-

(m) *Ante*, 309; *post*, 318, n. *(g)*.

(n) *Doe v. Cole*, 7 B. & Cres. 243, where see form of deed given effect to.

(o) *Ante*, 243 to 287.

(p) See 2 Sand. Uses and Trs., 40.

(q) 5 B. & Cres. 221.

(r) See in general 2 Bla. C. and notes, 317 to 323; Bac. Abr. tit. *Leases*.

(s) *Ante*, 254, 255.

(t) 1 Campb. 317; 7 B. & Cres. 246.

tion, not strictly *real* property, though certainly an interest therein, but is *personal* estate for most purposes, (u) though, as it is connected with land, it gives a right to vote for a county member of parliament. (v)

A lease for *years* of *corporeal* real property, though usually sealed, need not, even since the statute against frauds, (x) be under seal, though it be for a long term of years, (y) and, indeed, for not exceeding three years, might still be by parol. (z) If the instrument be signed, and contain words of immediate demise, although it has prospective terms of granting a more formal lease at a future period, it will operate immediately as a lease, and must be stamped as such. (a) The stamp is to be upon the sum *expressed* in the lease, without regard to what may have been really paid, or agreed to be paid. (b) To perfect the interest of a lessee for years of corporeal property, it must be alleged in pleading, and proved in fact, that he *entered*, or that he elected to take, as if the lease operated as a bargain and sale under the statute of uses; (c) or he will have only an *interesse termini*, which, however, will not merge in an estate for life, unless the owner of the latter have possession. (d)

When a lease is granted under and in pursuance of a leasing power by a tenant for life, there is not to be upon his death any apportionment of the rent, but the succeeding owner is entitled to the whole of the accruing rent, (e) and he may sue for the same and for other breaches of covenant, as if he were strictly the assignee of the reversion. (f) With respect to what shall be considered an *under-lease*, and not an assignment, it has been held, that if a party having a term which expired on 11 November 1826, let the premises verbally from 11 September to 11 November in that year, for 270*l.* payable *immediately*, this is a sufficient legal parol demise, and not an assignment requiring a writing under the statute against frauds, 29 Car. 2, c. 3, sect. 4; but that being a demise of the *whole* of the interest, the lessor could not distrain; (g) and where there has been a lease from G., the owner in fee-simple, to A., and then a sub-lease by A. to B. for a shorter term, at an improved rent, A.'s *grant* to G., the reversion of the sub-lease, and the benefit of the improved

(u) *Ante*, 84, n. (a), 145, n. (a); 2 Bla. C. 386, 433.

(v) *Ante*, 264.

(x) *Ante*, 292, 293.

(y) 1 T. R. 735; 12 East, 168.

(z) *Ante*, 292, 293.

(a) 1 T. R. 735; 12 East, 168, what amounts to a lease, or only an agreement, *ante*, 254, 255.

(b) 10 B. & C. 673; 3 Dowl. & R. 186.

(c) 8 Bing. 99.

(d) 5 B. & Cres. 111.

(e) 1 Swanst. 337; 2 Saund. R. 288, note 2; 10 Ves. 66. The 11 Geo. 2, c. 19, s. 15, when applicable, is defective in not giving any remedy by distress.

(f) 3 M. & S. 382.

(g) 5 Bing. 24; 2 Moore & P. 57, S.C.

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rent, will not merge or prejudice the first lease, so as to preclude *G.* from suing *B.* for the improved rent; and if *G.*, by lease and release, convey the premises and reversion to *H.* in fee, by way of mortgage, the latter may sue *B.* in covenant for the improved rent. (*h*)

We have seen the necessity for inserting in leases all proper express stipulations, as well on the part of the lessee as of the lessor; (*i*) and as the destruction of a demised house by fire will not suspend the tenant's liability to pay rent, although the lessor may have received insurance money, unless expressly provided otherwise, leases should contain express covenants in that respect. (*j*)

A lease for years of incorporeal property must always be under seal, or it will operate merely as a license, as of tithe. (*k*) or of a several fishery in an arm of the sea or navigable river. (*l*)

So a lease to create a freehold interest, as for term of life, must be under seal, or it will be wholly inoperative, as in the instance before mentioned of a demise from year to year, determinable only at will of lessee, who thereby would, in effect, take an estate for his life. (*m*)

5. Exchange. (*n*) An *Exchange* is a reciprocal grant of equal interests or estates, and qualities, the one in consideration of the other; and the word *exchange* is essential in such mode of conveyance. (*o*) But the estates need not be of equal quality, if of equal quantity, (*n*) nor of equal value, and the stamp act 55 Geo. 3, c. 184, expressly subjects only the money paid for equality of exchange to the *ad valorem* duty; (*p*) and an exchange is not a conveyance under that act, so as to subject the value of the estate, but only the money paid for equality to that duty. (*q*) Upon a conveyance strictly of exchange, it was essential that actual entries should be made on the properties exchanged on both sides, and if either died before such entries, the exchange was void for want of notoriety, (*r*) for which reason Mr. Butler has observed, that an exchange by lease and release is to be preferred, because in that case the statute executes the possession instantly upon execution of the deeds. (*s*)

(*h*) 7 Bing. 755.

(*i*) *Ante*, 118 to 120.

(*j*) *Leeds v. Cheetham*, 1 Sim. R. 146.

(*k*) 9 B. & Cres. 479; 4 Man. & R. 334; 5 B. & Cres. 875; 7 Bing. 691.

(*l*) 5 B. & Cres. 875.

(*m*) *Ante*, 306, note (*m*); 8 East, 167.

(*n*) See in general, 2 Bla. Com. 323;

see Loft, 416; 2 Bla. Rep. 936; 3 Wils. 468; 7 B. & Cres. 399; 2 B. & Cres.

663; 7 Dowl. & R. 185, S. C.; Com. Dig., Exchange.

(*o*) 3 Wils. 458, 485.

(*p*) Schedule, tit. "Conveyance," "Exchange."

(*q*) *Doe v. Preston*, 7 B. & Cres. 392.

(*r*) Co. Lit. 50.

(*s*) Co. Lit. 271, b. note (*l*), Mr. Butler's note.

An exchange can properly be only between two parties, though the number of persons is immaterial.^(t) In an exchange, properly so called, the word "exchange" only is the operative and indispensable word, and implies a warranty. Where an exchange is effected by lease and release, there are two operative parts, by the first of which *A.* in consideration of the conveyance after made in exchange by *B.* to *A.*, releases &c. to *B.*; and by the second, *B.*, in consideration of the conveyance before made in exchange by *A.* to *B.*, releases &c. to *A.* There is one great difficulty attending exchanges, that each party, in making out his title to the lands which he takes in exchange, is required to show the title not only to the lands or other property taken, but also to that given in exchange. From the great difficulty and expense attending such investigation, it may be a subject worthy the consideration of both parties, whether it would not be better to have a distinct conveyance from each to the other of the properties given and taken in exchange, in consideration of a sum of money expressed in the deed, (about the value of the same,) upon which an *ad valorem* stamp will be payable, but the expense of which will, it is apprehended, in most cases, be found to be the least; or at all events each property will thereby be afterwards more marketable.

Partition is the mode by which coparceners, joint tenants, 6. Partition. and tenants in common divide their interests, so that each may have a separate and distinct interest in certain parts of the property, over which, before, all interests extended. This must, since the statute against frauds, be effected by deed.^(v) Each joint tenant being seised of the whole, livery of seisin was never necessary in this case.^(w) A partition is now usually effected by the intervention or means of a third party, to whom the property is limited or conveyed in the first instance. When the property is of such a nature as to be capable of being limited to a use, it may be effected by one instrument conveying to a trustee all the property, to the use of each party separately of such portion of it as it is intended he should take in severalty.* Where the estate is leasehold, or of such a nature that it cannot be limited to an use, the partition must be effected by several deeds. By the first, the whole estate is transferred to a trustee, upon trust to re-transfer to each his

(t) 2 Bla. R. 936; 3 Wils. 468; Lofft, 401, 404.

(u) 2 Bla. C. 323, 324.

(v) 20 Car. 2, c. 2; 2 Bla. C. 324.

(w) Co. Lit. 200, b.; but see 2 Bla. C. 24, *contrâ*.

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allotted portion, which re-transfer may be effected either by a deed or several deeds indorsed on the first, though it is advised that in all cases there should be a separate deed for each party, which would be attended with but little more expense, and there should; in all events, be a covenant by the party retaining the principal deed with each party to produce such deed in support of his title.

Then follow certain common law conveyances, which, as Blackstone states, presuppose some other conveyance precedent, and only serve to *enlarge, confirm, alter, restrain, restore, or transfer* the interest granted by the original conveyance, such as *releases, confirmations, and surrenders.* (x)

7. Releases.

With respect to *Releases*, if one joint tenant *assign* to the other, it operates as a release, and must be so pleaded. (y) There must be a privity of estate between the *releasor* and the *releasee*, in the case of a release by way of *enlarging* an estate, but on a release *per mitter le droit*, as to a disseisor, it is otherwise. (z) In the former release there must be an *immediate* remainder or reversion, for if *A.* have a term for years, remainder to *B.* for years, remainder or reversion in fee to *C.*, *C.* cannot pass his interest to *A.* by such release, for want of privity, and on account of the intermediate term in *B.* (a) The several sorts of releases are:—1. By way of enlargement of a prior particular estate; as by conveyance from a remainder-man in fee to the owner of the particular estate. 2. By way of passing an estate; as a release by one joint tenant or co-parcener to the other. 3. By way of passing (that is extinguishing) a right; as a release by a disseisee to a disseisor. 4. By way of extinguishment; as a release by the owner in fee to the grantee of a particular tenant. 5. By way of entry and feoffment; as a release by a disseisee by one of two disseisors. The *first* of these is that species of conveyance which is in most common use, and forms part of the assurance by lease and release, which we shall presently consider; the lease for a year, or bargain and sale, being that part of the conveyance which vests the possession in the bargainee under the statute, and upon which the release operates by way of enlargement of the estate. But this conveyance by release is equally used in those cases in which the possession was *already previously* vested in the party to whom the release is made, without reference to or in contemplation of such release. As if *A.*, the owner in fee, by lease demise lands

(x) 2 Bla. C. 324.

(a) 2 Bla. C. 324, 325.

(y) 2 Cruise, 527.

(b) Co. Lit. 273, b.

(z) Co. Lit. 274, a., note c.

to *B.* for a term of 21 years, with intent merely to create an ordinary tenancy, and *afterwards* the lessee *B.* agrees with *A.* to purchase the fee; in that case *A.* might always, at common law, convey to *B.* such fee by *release*, and without feoffment and actual livery, the tenant *B.* being already in possession under his previous common law lease.

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A *Confirmation* is defined to be an act by which an estate or right *in esse*, otherwise voidable, (but not absolutely void,) is made sure and unavoidable, or whereby a particular estate is increased. (c) And the words of making such confirmation are, "have given, granted, ratified, approved and *confirmed*." (c) Thus if tenant for life leaseth for forty years, and dieth during the term, here the lease for years is voidable by him in reversion; yet if he had *confirmed* the lease *before* the death of the tenant for life, it would no longer be voidable but sure. (d) When a tenant for life and the remainder-man in fee join in making a lease, it should not be pleaded as the *lease of* both in its *inception*, because, whilst the tenant for life is living, it is only *his* lease, and the confirmation of the remainder-man; but it should be stated that the former *demised*, and that the latter *confirmed*. (e) The distinction between *void* and *voidable* leases must, in these cases, be kept in view, for if a lease be absolutely void a confirmation would have no operation upon it. (f) And although generally the acceptance of rent by a person who is entitled to set it aside will confirm it, (g) yet acceptance of rent by a tenant in tail, on coming into possession, or suffering the tenant to make improvements, is no confirmation of a lease made by a tenant for life, because that was absolutely void at his death. (h) And where a lease, executed by a tenant for life, in which the reversioner, who was then under age, was named, but the same was not executed by him, was void on the death of the tenant for life, it was held that an execution *afterwards* by the reversioner was too late, and no confirmation of it even so as to subject the lessee to an action of covenant for subsequent breaches; (i) and the receipt of rent by a remainder-man will, in these cases, only create a new tenancy from year to year, requiring notice to quit before pro-

3. Confirmation.

(c) See in general Com. Dig. Confirmation; 2 Bla. C. 325.

(d) Co. Lit. s. 516.

(e) 6 Coke, 14, b., 15, a.; 2 Cases and Opinions, 148, ed. 1791.

(f) Gilb. Ten. 75.

(g) Per Kenyon, C. J. 2 Esp. R. 677.

(h) Bul. N. P. 96; Doe v. Butcher, 1 Dougl. 50; Cowp. 482.

(i) 1 T. R. 86; 7 T. R. 83; 2 Esp. R. 501.

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ceedings in ejectment; (*k*) and where a lease is granted by a tenant for life, who has a leasing power, but such lease was not confirmable, it was held that a recital of the lease in a conveyance afterwards executed by the remainder-man, was no confirmation. (*l*) The operative words of a confirmation are "ratified and confirmed," though it is usual, also, from prudential motives to insert the words, "given and granted also," so that the deed may also have the operation of a new grant.

9. Surrenders.

Surrenders are the rendering back, yielding up, returning, or relinquishing of a particular estate, as for life or years, to him that hath the *immediate* estate in reversion or remainder, and by which such particular estate merges, or is drowned in the larger interest by becoming vested in the same person. (*m*) But if a lessee grant only *part* of his estate to his lessor, whereby a reversion continues in himself, this is not a surrender; as if a lessee for twenty years grant all his estate to his lessor, except one year, month or day, at the end of the term, this is not any surrender, because the lessee hath a reversion. (*n*) Surrenders are either in *fact* or by *operation of law*; we have seen that the former must be in writing and signed by the surrenderor, but that the latter are expressly excepted from that enactment. (*o*) Surrenders in *fact* must therefore be in writing and signed or will be void, (*p*) or there must be circumstances from which such surrender *in fact* may and ought to be *presumed*. The word *surrender* is usual though not essential. (*q*) Almost any signed note in writing will amount to a sufficient surrender in fact, and therefore where a mortgagee wrote on the mortgage deed, "Received of *A. B.* for principal and interest, and I do release and discharge the within premises from the term of 500 years;" this was holden to be a *sufficient note in writing* and a valid surrender. (*r*) The surrenderee should *re-enter*, but it is not ne-

(*k*) 1 Hen. Bla. 97; 1 Bos. & P. 531, 532; 7 T. R. 83; 10 East, 261; Adams's Eject. 3d ed. 110, 111; *ante*, 266; and *Doe v. Morse*, 1 B. & Adolph. what acceptance by remainder-man of reserved rent, &c. creates a *new* tenancy.

(*l*) 2 Dowl. & R. 716.

(*m*) Co. Lit. 337, b.; and *per* Tindal, C. J. 7 Bing. 757.

(*n*) *Id. ibid.*, and therefore where *L.* being seised in fee, demised to *B.* for twenty-one years, from June, 1814, and then *B.* demised to *M.* for the like term, but wanting twenty-one days, and then by deed-poll *B.* granted to *L.* (the first lessor) such sub-lease and the premises and improved rent thereby reserved, to hold to

L. for the term demised to *M.*; and then *L.* by lease and release conveyed all his interest in the premises to the plaintiff in fee by way of mortgage, it was held that such deed-poll from *B.* to *L.* did not surrender or merge the chattel interest in the fee, or suspend the right of the plaintiff to sue *M.* on the covenant in the lease to him; and that the conveyance by lease and release properly included and conveyed the chattel interest. *Burton v. Barclay*, 7 Bing. 745.

(*o*) *Ante*, 293; 29 Car. 2, c. 3, s. 3; 9 B. & Cres. 288.

(*p*) *Id. ibid.*

(*q*) Cro. Jac. 169; Wils. 127.

(*r*) 2 Wils. 26.

cessary to aver it in pleading, and it suffices to allege generally that the tenant surrendered his term without even showing that he did so in writing.(s)

The mere *cancelling* a lease, as by tearing off the seals and erasing the names, and verbally declaring the intention to surrender, even in the presence of fifty witnesses, and with the express intention to determine the lease, cannot in law, and against the express terms of the statute, amount to a surrender, and, at least at law, the interest and liability of the lessee will continue, for cancellation is a mode of attempting to put an end to a term which the law does not allow.(t) And though after a lapse of time, coupled with other circumstances, a sufficient surrender may be *presumed* to have been made; yet the mere production of a lease in a cancelled state will not be sufficient to raise the presumption; and therefore where the lease, when produced out of the lessor's possession, appeared to have had the names of the parties torn off, yet this was held not to be a surrender by operation of law, nor *prima facie* evidence of a surrender by deed or note in writing, and that the lease, as so produced, was evidence of the lessee's title.(u) And an acceptance of a surrender in writing is not to be presumed from the circumstances of the same rent having been paid not by the original tenant but a third person.(x)

With respect to the *presumption* of the surrender of long terms of years, created for the purposes of settlement or by way of mortgage, much discussion has arisen when or not such a presumption should prevail.(y) One rule appears to be, that a surrender shall in general only be *presumed in favour* of a party who has proved himself to be *beneficially* entitled, and not *against* such party; nor in favour of a party who proves no right of beneficial enjoyment.(z) But such a presumption may be made *against* as well as for the legal owner, if the justice of the case require; as if a mortgagor set up a term that existed at the time of the mortgage against his own mortgagee, but of which, in honesty, he ought to have secured the benefit to the mortgagee, and not to have reserved it in his own power, as an instrument to defeat his mortgage.(a) One of the *general* grounds of a presumption of this nature is *the existence of a state of things which may most reasonably be*

(s) Cro. Car. 101.

(t) *Roe v. York, Arbp. of*, 6 East, 86; 9 B. & Cres. 288, 296. When a Court of Equity will relieve a tenant, see 2 Vern. 112, *post*, 319, note (o).

(u) *Doe v. Thomas*, 9 B. & Cres. 288.

(x) 1 Stark. R. 96.

(y) See in general Sugd. V. & P. 8 ed. 408 to 417; Adams's Eject. 3d ed. 88, 89; 2 B. & Ald. 710, 782.

(z) *Doe v. Cooke*, 6 Bing. 174, *per* Tindal, C. J.; 2 B. & Cres. 710, 782.

(a) *Per Abbott, C. J.*, 2 B. & Cres. 782.

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accounted for by supposing the matter presumed."(b) If no evidence be given of the existence of a term to attend the inheritance for thirty years, and the owner in fee has acted as if it had been surrendered, it was held that the jury might presume that it had been surrendered, the purpose for which the term was created having been long since fulfilled.(c) But if such a term has been recognized in a recent deed, executed within twenty years of the time of trial, it should seem that then a surrender could not in general be presumed.(d) In the case of a plain trust, where the trustees were directed to convey, the jury may presume a conveyance, and consequently a surrender, even within twenty years.(e) But the presumption, like all others, may be rebutted, and the jury ought, upon the whole evidence adduced, not to presume a conveyance or surrender unless they are satisfied that it did take place.(f)

A surrender by *operation of law* takes place where a lessee for life enfeoffs him in reversion in fee; or where the lessee and lessor join in a feoffment; or where a lessee for life or years accepts a new lease or demise from the lessor:(g) The acceptance of any new valid term is clearly a surrender by operation of law, the last being inconsistent with the first.(h) So a new agreement by parol, if valid, and *varying* from the first entered into between the parties, may operate as a legal surrender or abandonment of the prior interest.(i) So the verbal acceptance of a new tenant, with the assent of the first, may operate as a surrender of the interest of the first.(k) And if in a tenancy from year to year, created by a parol, the landlord give a parol license or notice to quit, although in the middle of the quarter, and the tenant consent, and the lessor accept possession, the tenancy is thereby surrendered.(l) But in these cases, especially of an irregular notice, the consent of all parties is essential to complete the surrender;(m) and it has been held that an insufficient notice to quit, though accepted, is not a

(b) *Ante*, 317, n. (a); *Adams' Eject.* 3d ed. 90.

(c) *Bartlett v. Downes*, 5 Dowl. & R. 526; 1 Car. & P. 522, S. C.

(d) 11 East, 478.

(e) 4 T. R. 682.

(f) 5 B. & Ald. 232. In practice the decision of a *common jury* upon a question of presumption of a surrender, is not the exercise of their *understanding*, but will be regulated by the direction of the judge; and, therefore, the verdict should be set aside upon any misdirection, and not treated as the result of a finding upon facts, unless the judges should think that

they would have come to the same conclusion; and see cases and observations, *Sugd. V. & P.* 444 to 447, against the doctrine of presuming a surrender of terms, especially when to attend the inheritance.

(g) *Per Little Dale, J.*, 9 B. & Cres. 298.

(h) *Com. Dig. Surrender.*

(i) 5 B. & Cres. 269.

(k) 2 B. & Ald. 119.

(l) 5 Taunt. 518.

(m) 2 B. & Ald. 50, 119; 2 Moore, 262; 3 B. & Cres. 478; 1 M'Clel. & Y. 141.

legal surrender. (n) In a Court of Equity, where a lessee for years, having agreed to surrender his lease to the lessor, delivered up the key, which the lessor accepted, but afterwards refused to accept the surrender, it was decreed that the lessee was discharged from the rent. (o) The operative words in a surrender are "*surrendered* and yielded up;" but they are usually *ex abundante cautela* preceded by the words "granted." The word "release," will also operate as a surrender. (p)

We have seen that by the express terms of the statute against 10. *Assignment.*
frauds every *transfer of any* interest in real property must be (q)
in writing; and a verbal assignment even of a parol tenancy from year to year is void. (r) An *assignment* is a transfer of the *whole* of a party's interest, and usually of an estate or interest for *years*; whereas if there be a reservation of any part of that interest, even for one day, the instrument is an *under-lease*; and the operation of the two instruments is perfectly distinct, for an assignee of a lease is liable to be sued by the lessor, but not an under-lessee; (s) and though in general when the legal effect of the instrument was *intended* to be an assignment of the whole interest it will so operate and should be so pleaded, yet when otherwise intended, and where there is an improved rent reserved to the grantor, it will for some purposes be construed and given effect to as a lease or demise, so as to enable the lessor to sue in *assumpsit* or covenant, though the grantor, having no reversion, could not distrain, unless by virtue of an express clause in the nature of a real charge. (t) A chattel real, as a lease for years, may pass by assignment under the general words in a lease and release of the reversion in fee. (u)

With respect to the *liability* of an assignee, he is liable to be sued for the breach of all covenants running with the land, as it is technically termed, that is in general all covenants for the support and protection of the thing demised; (x) and it is immaterial for this purpose whether he have entered or taken possession, (y) or be an absolute assignee, or merely a mortgagee. (z) And in the case of a mere equitable mortgage by

(n) 4 B. & Cres. 922.

(o) *Batchbott v. Porter*, 2 Vern. 112.

(p) And see *ante*, 316, n. (r), as to what words will suffice.

(q) See in general 4 Cruise's Dig. 160; Com. Dig. Assignment.

(r) 1 Campb. 318.

(s) Dougl. 183; but for wilful waste an under-tenant may be sued, 1 Moore, 100; 6 Taunt. 301; 1 New R. 290.

(t) 2 Moore & P. 57; 5 Bing. 24, S. C.;

1 Stra. 405; 1 T. R. 445, *ante*, 311; Leases.

(u) 7 Bing. 760.

(x) As to what covenants run with the land and bind an assignee, see *Platt on Covenants*, and 1 Chit. Pl. 5 ed. 55, 56; 2 Chit. R. 608; 2 Hen. B. 133; 5 Co. 16.

(y) See several cases, 1 Chit. Pl. 56, note (a), 5 ed.

(z) *Williams v. Bosanquet*, 1 Brod. & Bing. 238; 3 Moore, 500, S. C.; *Burton v. Barclay*, 7 Bing. 761, 762.

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deposit of a lease, a Court of Equity might compel him to accept an assignment, so as to subject him to complete liability at law. (a)

The assignee of a lease is bound to *protect the lessee*, although the assignment contain no covenant to do so; but when the assignee has executed no covenant the remedy against him must be *assumpsit*. (b) And if an assignee take from a lessee *leasehold* by indenture, *sealed* by the assignee, and indorsed on the lease, *subject* to the rent reserved in the lease, he is liable to be sued in *covenant* for the rent which the lessee has been called upon to pay to the lessor subsequent to the assignment. (c) But an assignee by operation of law, as the assignee of a bankrupt, is not liable, unless he elect to take the benefit of the lease, which is a question of fact occasioning frequent discussion. (d)

But an assignee, unless he be under a covenant to perform covenants, may, as well in equity as at law, *get rid of continuing liability* by purposely assigning over even to a married woman or a pauper; (e) and this, notwithstanding the lease contains a covenant not to assign. (f) Hence it is in general expedient for a lessee, substantially intending to part with his interest, to grant an under-lease, reserving a reversion, and with proper covenants, so as to enable him to distrain or sue, or at least to assign by indenture containing express covenants on the part of the assignee, and restrictive upon him, and stipulating expressly that he and all claiming under him shall perform the covenants in the original lease, and to indemnify against all liability, damages, and costs, and even to pay interest on any money the original lessee may be obliged to pay. In these cases, if the lessee be sued, it is advisable to give the sub-lessee or assignee notice, and require him to indemnify, though such notice is not strictly necessary. (g)

Although an assignment is an assurance most commonly used for the purpose of transferring a *leasehold* estate from lessee to assignee, or from assignee to assignee, yet there are other cases to which an assignment is applicable. Thus *equitable interests* of longer duration than a term, as an equity of redemption

(a) *Lucas v. Comerford*, 3 Bro. C. C. 166; 1 Ves. 235, S. C.

(b) 5 B. & Cres. 589.

(c) 9 Bing. 60.

(d) 7 East, 335; 1 B. & Ald. 593; 1 R. & Mood. 207; Peake's R. 238; 6 G. 4, c. 16, s. 75.

(e) Cases at law, 1 B. & P. 21; Platt, Covenants, 503; in equity, 3 Russ. R. 158; 2 Mad. 330; 2 Atk. 546; 1 Bro. P. C. 516; 8 Ves. 95.

(f) 1 Scho. & L. 310; 8 B. & Cres. 486.

(g) 3 Bar. & Adolp. 407.

in fee, when it is to be transferred to a stranger, should be passed by assignment. (h)

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11. Defeazance.

11. The last of the common law deeds usually enumerated are *defeazances*, which are defined to be *collateral* deeds, made at the same time as a feoffment or other conveyance, containing certain conditions, upon the performance of which the estate then created might be defeated. (i) These deeds have not unfrequently been used for fraudulent purposes as against third persons or the public, so as to conceal the real transaction; as where grants of rents-charge have been executed to create a qualification to kill game, or other purposes, and then the grantee has at the same time executed a deed of this nature, with the view of preventing him from setting up the grant against the grantor. (k) Fraudulent grants, containing an agreement to reconvey or to defeat the estate granted, are expressly declared void, and not to create a qualification to vote for a member of parliament, but the estate is absolutely vested in the person to whom it is so granted, and the parties are subjected to 40% penalty. (l) Where a father, on the expected marriage of his son, and to induce a supposition on the part of the father of the intended wife, that the son was beneficially entitled to an estate, conveyed the same to him absolutely, a secret deed, intended to counteract its effect, was held, by a Court of Equity, to be wholly void, as a fraud upon the father and his daughter, and on the marriage contract. (k)

To a defeazance there are six requisites, 1st. That it be made by the same species of assurance as the principal instrument. 2d. That it recite or refer to the deed to which it relates. 3d. That it be made between the same persons as are parties to the deed to be defeated. 4th. That where, as in case of feoffment, the estate is executed, it be made at the same time as the principal instrument. 5th. That in case of bonds or other executory instrument, it be made at the same time or subsequent (not previous) to the bond, &c. 6th. That it be made of a thing defeazible.

Though some deeds of defeazance may be made by a *sepa-*

(h) *Ante*, 307.

(i) 2 Bla. C. 327.

(k) When or not such fraudulent deeds are operative, see 2 B. & Ald. 367; 3 Y. & Jer. 168; 2 Jac. & Walk. 391, 565; Clit-

ty's Game L. 2d ed. 58, note (b). *Semhle*, a Court of Equity will not grant relief to either party, in case of a fraudulent deed, unless the deed itself provide it, *Id. ibid.*

(l) 10 Ann. c. 23, s. 1.

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rate instrument, yet such practice is extremely inconvenient, and generally discountenanced. In the case of a warrant of attorney, the defeazance must be on the same piece of paper or parchment as the warrant, ^(m) and does not require a separate stamp. ⁽ⁿ⁾

Of deeds operating under statute of uses, 27 Hen. 8, c. 10.

Deeds *operating under the statute of uses* are next to be considered. It would be beyond the scope of this undertaking, to examine very particularly the history, provisions, or operation of that statute, ^(o) and we shall merely state a few *practical rules*, showing when the *legal estate* and interest is transferred, or as technically termed, *executed* and *vested* in the *cestui que trust*, who is also in general *beneficially* interested; or when the legal estate remains, or is, only partially executed, and is vested in a person who has no beneficial interest, but is merely a *trustee* for another. The general rule is, that at *law* all legal proceedings (excepting an action of *trespass* against a wrongdoer, who has no title whatever,) must be in the name of the person who has the *legal* interest, as especially in the action of ejectment, and consequently it is of the utmost importance for all legal practitioners to be well able to determine in whom, upon the due construction of deeds or wills, the legal estate is vested. All conveyances to uses in general are to be construed the same as a common law conveyance. ^(p)

When or not the use is executed, or *e converso* when the legal estate remains in a trustee.

With respect to what uses are executed by the statute of 7 Hen. 8, c. 10, so as to vest the *legal* interest in a party *beneficially* interested, or what is a *trust* estate where the use is not executed, there are several rules.

1st. The statute does not affect estates of *copyhold* tenure, because it is against the nature of that tenure that any person should be introduced or interposed without the consent of the lord. ^(q)

2dly. The statute, speaking only of persons *seised*, does not extend to leases or *terms for years*; as where *A.*, possessed of a lease for years, assigns it to *B.* to the use of *C.*; the statute does not affect this use, and the legal estate will remain

^(m) 3 Geo. 4, c. 39, §. 4. See 10 Bar. & C. 500.

⁽ⁿ⁾ 1 New R. 279.

^(o) See the principal act, 27 Hen. 8, c. 10; and see in general, Sanders on

Uses and Trusts; Sugden, Gilb. U. & T., 1 Saund. 254, note 6; 2 Saund. Index, Uses and T.; 2 Bla. Com. 328 to 340#

^(p) Willes, 180.

^(q) Gilb. Ten. 170.

vested in *B.*, and *C.* will only have an equitable interest; and if a term of 1000 years be limited to *A.* for the use of or in trust for *B.*, the statute does not execute this use, but leaves it as at common law. (r) The creation and continuance of such terms has long been a great object in conveyancing, and we have seen when or not a presumption will be allowed of their having been surrendered. (s)

3dly. When a use is limited upon a use, it is not executed, but the legal estate is vested in him to whom the first use is limited, and no further. (t) As where an estate is conveyed to another in these words, "to *A.* and his heirs, to the use of him and his heirs, in trust for or to the use of *B.* and his heirs, the use is not executed in *B.*, but in *A.*, and the legal estate is vested in *A.* as a trustee. (u) So where an estate was limited to *A.* to the use of *A.*, to the use of *B.*, it was held that *A.* took the legal estate, and that although he took it by the common law, and not by force of the statute of uses, yet the second use could not be executed by the statute. (r) So where *E.* made a settlement to the use of himself and his heirs, until his then intended marriage, and afterwards to the use of his wife for life, and after her death to the use of trustees and their heirs, during the life of *E.*, upon trust to permit him to take the profits, remainder to the first and other sons of the marriage, &c. remainder to the use of the heirs of the body of *E.*; it was adjudged that *E.* took only a trust estate for life, for the use to him could not be executed upon the use which was limited to the trustees for his life, and consequently that the legal estate for his life was executed in them by the statute of uses, and the limitation to the heirs of *E.* operated as words of purchase, and created a contingent remainder. (v)

4thly. When something is to continue to be done by the trustees, which render it necessary or expedient for them to have the legal estate, such as payment of the rents and profits to another's separate use, or of the debts of a testator, or to pay rates and taxes and keep the premises in repair, or the like, the legal estate is vested in them, and the grantee or devisee has only a trust estate. (y) In general the distinction

(r) Poph. 76; Dyer, 369; 2 T. R. 448; 2 Bla. C. 336; 2 Inst. 671.

(s) Ante, 317, 318.

(t) Dyer, 155.

(u) Cas. T. Talbot, 138, 139, 164; 2 P. Wms 146; 1 Sand. U. & T. 153.

(v) Doe v. Passingham, 6 Bar. & Cres. 305. See the rule stated 1 Sand. 153, that a use cannot be limited to arise out

of the estate of a *cestui que use*, taking the legal estate at the common law.

(r) Carth. 272; Comberb. 312, 313; 1 Ld. Raym. 33; 4 Mod. 380; see also 7 T. R. 342, 438, S. C. 433; 12 Ves. 89.

(y) 3 Bos. & Pul. 178; 2 T. R. 444; 6 T. R. 213; 8 East, 248; 9 East, 1; 12 East, 455; 4 Taunt. 772. See instances 2 Bla. Com. 335, note 60.

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under the latter rule is, that where the limitation is to trustees and their heirs, in trust for *them* to receive and pay over the profits, the legal estate is vested and continues in them, so as to enable them effectually to perform the declared object; but that where the trust is to *permit and suffer* the party beneficially interested to *receive* for his use, then the legal estate may be executed and vested in the latter. (z) Where however the person beneficially interested is a married woman, then to prevent loss from the interference of the husband, the construction of the terms of the trust is in general in favour of the trustees retaining the legal interest. (a)

The following general rules are laid down by a very eminent conveyancer concerning *equitable estates*: (b) 1st. The *cestui que trust* is the beneficial owner in equity, and has an equitable estate. 2dly. This estate gives the like power of alienation in equity as may be rightfully exercised at law by the owner of a like legal estate. 3dly. The like limitations may be made of the equitable as may be made of the legal ownership. 4thly. The limitations of trust or equitable estates receive the like construction as if they were limitations of the legal estate. 5thly. Whenever a limitation of an use would be good by the rules of law, a like limitation of the trust or equitable ownership will be valid in equity. 6thly. Any limitations which, as tending to a perpetuity, would be void if it were of an use, will be void if it be of the trust or equitable ownership. 7thly. Of equitable estates there cannot, in a technical sense, be any dis-seisin; and therefore, notwithstanding adverse possession, there may be transfers or dispositions by the equitable owner either by deed or will. (b)

The several deeds operating and having their principal legal efficacy under the statute, are these, 12thly, a covenant to stand seised to uses; 13thly, a bargain and sale; 14thly, a lease and release; and which, especially the latter, have long become and continue to be the principal modes of conveyance, where the grantor has a freehold interest.

12. Covenant
to stand seised
to uses. (c)

12. *Covenant to stand seised to uses.* This is a mode of conveyance under seal, by which a person, at the time of making it, being actually seised of freehold property *corporeal*, cove-

(z) 2 Taunt. 109; 5 East, 163; 7 T. R. 435; 8 T. R. 597. And see other cases, 2 Bla. Com. 336, note 60; 2 Sand. U. & T. 206.

(a) 7 T. R. 652.

(b) 1 Prest. Ab. 144; and see *post*, division VII. as to the distinctions between *legal* and *equitable* estates.

(c) See in general 2 Bla. C. 338.

nants, in consideration of blood or marriage, that he will stand seised of the same to the use of his child, wife or kinsman, for life, in tail, or in fee. Here the statute of uses at once executes the estate, although the party in whose favour the deed has been made is never actually placed in corporeal possession, (*d*) and such a covenant is good, though the use be of freehold to commence *in futuro*; though we have seen that such an estate could not in general be created by a common law conveyance. (*e*) Such a use can only be in favour of a relation, and if declared to be for the use of a relation and a stranger, it will operate exclusively in favour of the former; (*f*) and even if there be any limitation to trustees, in trust for a blood relation, such uses will be void for want of the consideration of blood in the *trustees*, so strictly is this rule construed, (*g*) and this is one reason why this mode of conveyance is fallen into disuse. (*h*) The degree of relationship is not clearly defined to which a use may be limited, but it seems that at all events it may be to a *cousin*, (*i*) and there seems no reason why it should not extend to any *blood relation*, (*j*) but a use will not arise in favour of an *illegitimate child*, who is considered as *filius nullius*. (*k*) The usual words in a deed of this nature, are "covenant to stand seised to the use, &c." but these are not essential, for in this as well as in a bargain and sale; the instrument is to be distinguished rather by the nature of the instrument than by express words, so that if these express words be introduced in a deed in favour of a *stranger*, it will not operate as a covenant to stand seised, but it will, if duly inrolled within six months as a bargain and sale, operate as the latter, although the words bargain and sale be not introduced; (*l*) and on the other hand, a deed in favour of a near relative, although intended as a bargain and sale, if defective for the latter purpose, as on account of its not stating a pecuniary consideration, may operate as a covenant to stand seised, provided the deed state, as it always should, the near relationship. (*m*) So indentures of lease and release, the latter creating a fee tail to commence *in futuro*, although void as a release, were held to be valid as a deed of covenant to stand seised to uses; (*n*) and a deed which may

(*d*) 2 Bla. C. 338.(*e*) 4 Taunt. 20.(*f*) 2 Rol. Ab. 784, pl. 2, and 4; Cro. Jac. 181.(*g*) See 2 Sand. U. & T. 2.(*h*) Id. 82.(*i*) 7 Co. 40.(*j*) Who a *relation* in this sense, see*ante*, 109, 110, n. (*n*).(*k*) 2 Rol. Ab. 783; Co. Lit. 123, n. 8; 2 Sand. U. & T. 82.(*l*) 7 Coke, 40, b.; 2 Lev. 10; 1 Prest. Conv. 38.(*m*) 2 Saund. 96, b., 97; 2 Wils. 22.(*n*) 2 Wils. 75; 2 Keny. 239.

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take effect as a covenant to stand seised to uses is good, although the use is to arise after the decease of the covenantor, and although he do not affect thereby to dispose of the freehold in the mean time, and although the use is to arise at a period which may not happen until long after the covenantor's death, the use resulting in the mean time. (o) There are certain rules for pleading the operation of such a conveyance. (p)

13. Bargain and
sale. (q)

13. A bargain and sale of *real* property (r) is a contract under seal for *pecuniary* consideration and obtains its origin thus: (s) when the bargainor, for a sum of *money* paid down, bargained for or contracted to convey the same to the bargainee, and did so either without any conveyance or by one which was defective for want of livery of *seisin*, the bargainor, under the construction of the Court of Chancery, thereby became instantly a trustee for the bargainee, and an equitable interest in land thus became transferable by a formal conveyance by this name. Then came the Statute of uses, which executes the use or legal estate in possession in the bargainee, without his actually taking possession and without livery. At first, after the statute of uses, this sufficed, but in the same session the 27 Hen. 8, c. 16, (r) was passed, in order to retain some form of notoriety in the transfer of estates, requiring an *involment within six months* after the date in one of the courts at Westminster, or with the *custos rotulorum* of the county, or the same will be void. And this regulation is construed strictly, for although the indenture be antedated, yet the six months are to be calculated from the date. (t) The statute of involment requires that the bargain and sale shall be made by writing indented, sealed and inrolled, &c. but mentions those cases only "whereby any estate of inheritance or freehold shall be made." It does not, therefore, extend to a bargain and sale for a year or years, and it is under this omission that the usual bargain and sale or lease for a year, which precedes the release and forms with it the ordinary conveyance by lease and release, is effected. We have just seen when a defective bargain and sale may operate as a covenant to stand seised; (u) and on the other hand

(o) 4 Taunt. 20.

(p) How a covenant to stand seised is to be pleaded, 3 Salk. 306; 2 Ves. sen. 253; 2 Saund. 97, b.; Lutw. 1267; 3 Lev. 370; 2 Chitty on Pleading, 5 ed. 576.

(q) See in general 2 Prest. Conv. 212; 1 Saund. 251, n. 2; 2 Bla. C. 338. How to be pleaded, 2 Chitty's Pl. 6 ed. 577. *

(r) The statute 27 Hen. 8, c. 16, does not extend to interests less than freehold nor to assignments of terms *for years*.

(s) See 2 Sand. U. & T. 42.

(t) 11 East's Rep. 429.

(u) *Ante*, 325, note (m); 2 Saund. 96, b., 97.

there are cases in which a tenant under a lease for a term of years may elect to treat the same as a bargain and sale. (x)

From the definition which has been just given of a bargain and sale, it may be inferred that a *pecuniary* consideration is necessary to raise a use under this conveyance, but the amount is not now material, even the nominal consideration expressed in the ordinary bargain and sale for a year on which to ground a release being sufficient.

"Bargain and sale," though the usual operative words, are not absolutely essential, for any other words will be sufficient, and we have seen that a covenant to stand seised, if made for pecuniary consideration, may take effect as a bargain and sale, (y) that is if it be enrolled. •

So in the creation of a term, the words *grant and demise* will do, but it is better where the parties are desirous that the instrument should operate under the statute, as where it is to precede a release, to use the proper technical operative words "*bargain and sale*."

14. A conveyance by *lease and release* is now by far the most frequent mode of transferring any *freehold* interest, whether absolutely or by way of mortgage, on account of its capacity to operate in various ways, and on all *possible* contingencies; (z) and that it supplies the place of livery of *seisin*, and consequently avoids the necessity for the grantor and grantee going upon the land to deliver and receive the actual possession, and that this conveyance will equally operate, although, perhaps, neither party has ever been upon or ever seen the estate; and on account of its operation being equivalent, in this respect, to a feoffment, it has been said to amount to a feoffment. (a) But the operation of a feoffment and of a lease and release is, in most other respects, very different. A feoffment may be a tortious conveyance creating a fee, even though made by the owner of a particular estate, and therefore incurring a forfeiture; but a lease and release form but an innocent conveyance, which transfers only such an interest as the party conveying actually has, and no more, and may be for this reason used by any one without forfeiting his estate. (b) The mode of effecting this conveyance (at least when the transferee is not already in possession under an actual lease)

14. Lease and Release.

(x) *Ante*, 254, note (k).

(y) *Ante*, 325, note (l); 7 Rep. 40.

(z) See its different operation, 2 Saund. 96, b., 97; Cowp. 600; *ante*, 314. A re-

lease may operate as a new grant, Cowp. 600; 2 Bro. P. C. 48; 9 J. B. Moore, 46.

(a) Cro. Jac. 604.

(b) *Ante*, 287, note (s).

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is to prepare a lease for a year (then usually termed a bargain and sale for a year) of the land, dated the day before the intended release, and by which, when executed, the use of that term is executed, so that such lessee is supposed to be in actual possession, at least sufficiently so as to accept a release in fee or otherwise, dated on the day after, and then upon the latter day both the deeds are executed at the same instant, and the statute of uses is considered to have transferred the possession to the releasee and completely vests the estate and possession in the bargainee, to whom the legal estate has been transferred. (c) A chattel real, as a lease for years, or a remainder for years after a term, may be conveyed and pass together with a reversion in fee by the same general words in an ordinary lease and release. (d)

15. Deeds to lead or declare uses, and 16. deeds of revocation of uses, and 17. Deeds to charge and discharge incumbrances on land.

15. Then are usually enumerated, deeds to lead or declare the uses of other distinct conveyances, as well at common law as under the statute of uses; and 16. Deeds of revocation of uses; and 17. Deeds to charge or discharge incumbrances on land, such as bonds or obligations, recognizances and defeazances on each, and to which we shall here merely thus allude. (e)

Some other titles or modes of establishing a right or interest not before enumerated.

In the preceding arrangement we have adhered to the order adopted by Blackstone and other elementary authors on this subject, but there appear to be some titles still to be noticed, such as titles or interests, 18. By Award; 19. By Jointure or Settlement; 20. Voluntary Conveyances; 21. Fraudulent Conveyances; 22. Legal and Equitable Mortgages; and 23. Licenses.

18. Title by award.

18. Although it was formerly thought otherwise, it is now settled, that disputes respecting title to land or tithes, or other incorporeal hereditaments, may be referred to arbitration, and that one person may, by an award founded upon a proper order or agreement of reference, be directed to execute all the necessary conveyances to the other, and to perform all such acts as may be requisite to confer the perfect right as well as the possession; (f) and an award, that one of the parties is the

(c) 2 Preston on Convey. 211; 2 Crn. Dig. Lease and Release; Cases and Op. 143 to 149, tit. Reversion.

(d) 7 Bing. 760; and see the effect of a conveyance by lease and release of a reversion expectant on a term, and the mode of pleading such a conveyance,

Co. Lit. 270, a., n. 3; 4 Cruise, 199; 2 Chit. Pl. 5 ed. 578.

(e) See fully, 2 Bla. C. 339, 340, and notes.

(f) Rol. Ab. Arbit. E. 2 (2) B. 14, K. 15; Willes, 248; 3 East, 15; 7 East, 81; 3 Taunt. 426.

legal owner, or entitled to an estate, is binding on the other and his heirs; so that the order of reference and award are equivalent to title deeds. (g) But an award against trustees and guardians of an infant tenant for life of the realty, who died before the award was made, was holden not to be binding. (h) And an award between a lessee and his neighbour, awarding an act to be done for the benefit of the latter by the lessee, which would be waste upon the estate of the lessor, is bad. (i)

Many questions arise upon awards under the general or a local inclosure act in regard to the title to land, but the full consideration of which would be beyond the scope of this undertaking. (k) In general the legal title to an allotment is not acquired until the execution and publication of the commissioners' award, (l) and the preparation of plans and maps for the purpose of carrying an inclosure into effect, is no evidence of an allotment under an act which requires an appeal against an allotment to be made within six months after the cause of complaint had arisen, and it was held that it suffices to appeal within six months from the time of making the conclusive award. (m) But where the plaintiff pleaded a right of common under an award of commissioners appointed by an inclosure act, which authorized them to award such rights in respect of a certain messuage, and gave an appeal in three months after the award by feigned issue and to the quarter session; it was held that the limited time having elapsed, it was not necessary for him to show the original right, in respect of which the commissioners had given him the right in the award. (n)

19. Conveyances and transfers of real estates, as well as of personality, to trustees or others, by way of marriage settlement, and to secure a jointure or provision for younger children, should be completed before marriage; or at least marriage articles, agreeing for a prospective settlement, should be previously signed, (p) for in either of those cases they will, in general, be valid against creditors (q) as well as purchasers. (r) But if not entered into nor articles signed until after the marriage, they will then be invalid as against the then

19. Marriage settlements and jointures, (o)

(g) *Ante*, 328, n. (f); 3 East, 15.

(h) 3 Dowl. & R. 184.

(i) 5 Taunt. 454.

(k) 41 Geo. 3, c. 109, s. 35; 1 & 2 Geo. 4, c. 23; and see cases *infra*, note

(l) (m).

(l) 2 Bar. & Ald. 171.

(m) 1 Chitty's R. 366.

(n) *Phillips v. Maile*, 7 Bing. 133.

(o) See in general Chit. Eq. Dig., tit.

Settlement, 1205 to 1230, and tit. Marriage; and Roberts on Fraudulent Conveyances; 2 Bla. Com. 136; *post*, 333.

(p) Chit. Eq. Dig. 1217, 1218; *post*, 333.

(q) As to creditors, Ambl. 121; 17 Ves. 264, 271; 1 Ball & B. 252.

(r) As to purchasers, 1 Atk. 265; 2

P. Wms. 338, 674; *aliter*, as to any limitation in favor of a stranger, 2 P. Wms.

245; 10 Mod. 333; 3 Meriv. 249.

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creditors, if the party were insolvent at the time ; (s) and if he be a trader, then, in case of a subsequent bankruptcy, a settlement after marriage will be inoperative, except, perhaps, as respects the wife's property, although he were solvent at the time the same was executed. (t) A settlement after marriage would also be invalid against a *purchaser* for pecuniary or good consideration, although he had notice thereof at the time of accepting the conveyance to him. (u) Marriage settlements and jointures are in general regulated by the statute 27 Hen. 8, c. 10, and which enacts, that a jointure after marriage may be accepted or refused by the wife. (x) In general the settlement is by lease and release, but it will depend upon the nature of the property and estate therein, the same as every other conveyance. *Infants, whether male or female, are, in equity, bound by a proper and reasonable marriage settlement, although executed by them when under age, especially if parents or guardians have concurred. (y)

20. Conveyances in fraud of creditors, contrary to 13 Eliz. c. 5.

20. There are two statutes against *fraudulent conveyances and deeds*, and other acts, the 13 Eliz. c. 5, (z) for the protection principally of *creditors*, and the 27 Eliz. c. 4, (z) for the protection of *purchasers*. The first (a) enacts, "That every feoffment, gift, grant, alienation, bargain, and conveyance of lands, tencments, hereditaments, goods and chattels, or of any lease, rent, common, or other profit or charge out of the same, made *with intent* to defraud *creditors* and others of their just debts, &c. shall be utterly void, but *only* so as against those creditors and others, (a) and expressly declares (sect. 6.) that estates or interests conveyed or created on *good consideration and bona fide* in favor of persons not having any notice of such fraud, shall be valid."

This statute extends not only to fraudulent conveyances of *land* but of *personal* property; but it has been questioned whether it extends to land of *copyhold* tenure, (b) and to render a conveyance fraudulent within this statute, the party, at the time of making it, must have been indebted to the extent

(s) 12 Ves. 136; 10 Ves. 139; 2 Bro. C. C. 96; 2 Atk. 519, 600.

(t) 12 Ves. 136; 1 Ball & B. 252; 19 Ves. 88, 206.

(u) 18 Ves. 84, *post*.

(x) See statute and notes, Chit. Col. Stat. 271; and see the observations on settlement, *ante*, 57, 58.

(y) *Williams v. Williams*, 3 Ves. J. 545; 1 Bro. C. C. 152, S. C.; 18 Ves.

259; 2 Bro. C. C. 545; 1 Mad. Ch. 355.

(z) See these statutes, with notes, Chit. Col. Stat. 385 to 391.

(a) See 13 Eliz. c. 5, and notes, Chit. Col. Stat. *Fraudulent Conveyances*, 585. The party himself cannot take advantage of the act, but all *creditors* may, 4 East, 1; 5 B. & Cres. 560.

(b) 1 Cox's Rep. 278; Ellis, 155; but see Cowp. 705.

of general insolvency, (c) or at least the deed or act must have been *without* an adequate *consideration*, and with intent to defraud one or more particular creditors or persons, in which case it would be void even at common law. If the party executing were not indebted at all, or not insolvent, so that abundant other property to satisfy any then existing debts be left, then even a *bonâ fide* gift of *personal* property would be valid against creditors, or even a subsequent purchaser; (d) but not so as to *land*, with regard to subsequent purchasers thereof, in consequence of the enactment of 27 Eliz. But a party not subject to the bankrupt laws, may convey all or part of his property to a particular creditor in preference to others, (e) and even in part for his own benefit, and the deed will protect the part for the benefit of creditors, but not that for his benefit. (f) But a conveyance or other act, in preference of a particular creditor, must have been made *bonâ fide* with intent really to satisfy a just debt. (g) The fraud must, in general, be decided by a jury, (h) but it may sometimes be decided upon affidavits and motion. (i)

It has been supposed that a voluntary conveyance in favor of creditors is void if they do not execute, (k) and if *no creditor* assented to the deed it would be so, but otherwise if creditors accept the benefit, (l) and if even one of several trustees executes, that would suffice to vest the property. (m) In case of a conveyance of real property, or a chattel real, the circumstance of the conveying party remaining in possession thereof would not be deemed a badge of fraud, as in the case of an assignment of mere personalty, (n) because, as there are usually title deeds applicable to *real* property and interest therein, creditors ought not to be deceived by the bare possession thereof; (o) and the same rule even extends to some

(c) 3 B. & Adolp. 362; 5 Ves. 384; 1 Sim. & Stu. 315.

(d) *Twyne's case*, 3 Co. 82, a.; 1 Mad. Cha. 275; 1 Sim. & Stu. 315; *ante*, 108, note (i).

(e) 5 T. R. 235, 420; 8 T. R. 528; Newl, on Contr. 381, 382; 3 M. & S. 371; 4 East, 1; 5 Moore, 19.

(f) *Cailland v. Estwick*, 2 Anstr. 381; 5 T. R. 420, S. C.

(g) 2 Young & J. 304.

(h) 5 B. & C. 666; 8 Dowl. & R. 442.

(i) 8 B. & Cres. 217. The 3d section of 13 Eliz. c. 5, subjects the parties to a fraudulent conveyance to the forfeiture of the pretended purchase money, and one years' value of the land, and half a year's

imprisonment; and on a late trial and motion for a new trial, it was held that the assignees of one of the parties to a fraudulent conveyance, might, in an action on the statute, recover such penalties from him and the pretended purchaser. Mich. T. 1832; Campbell for plaintiff, Curwood for defendant; Holmes & Co. agents for plaintiff; and see 4 East, 1.

(k) 3 Sim. Rep. 1.

(l) 8 T. R. 521; 6 East, 257.

(m) *Ante*, 303; 9 Bar. & Cres. 300.

(n) *Ante*, 107, note (d); Chit. Col. Stat. 385, note (c).

(o) 5 Taunt. 212; *Baker v. Horn*, 9 East, 59; but see 2 B. & Ald. 551.

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fixtures and annexations to the freehold, even for the purposes of trade, and although in the possession of a trader who has become bankrupt, and notwithstanding the enactment in the 6 Geo. 4, c. 16, sect. 72. (o)

21. Voluntary conveyances in fraud of purchasers, against 27 Eliz. c. 4.

21. The 27 Eliz. c. 4, intituled "An Act against Covinous and Fraudulent Conveyances," enacts, that every conveyance, grant, charge, lease, incumbrance, and limitation of any use, of, to, or out of any lands, tenements, or other hereditaments, had or made for the intent and purpose to deceive and defraud such person as shall purchase the same for money, or other good consideration, the same shall be deemed and taken only as against that person, his heirs, &c. to be utterly void; but the 4th section declares that deeds upon good consideration and *bonâ fide* shall not be affected; (p) but voluntary deeds are, by the same terms of the act, good against the party conveying, and indeed it is a general maxim, that no one shall be allowed to allege his own fraud; (q) besides, a gift without consideration, if under seal, is valid against the party himself, and this, and the stat. 13 Eliz. were merely intended to protect purchasers and creditors. Copyhold estates are, it is supposed, not within this act; (r) and every prior conveyance, without pecuniary consideration or adequate value, excepting settlements before marriage, or in fulfilment of a contract before marriage, is considered voluntary, fraudulent and void, as against a *bonâ fide* purchaser, (s) and Lord Hardwicke said, "I hardly know an instance where a voluntary conveyance has not been held fraudulent against a purchaser." (t) Thus a voluntary settlement of lands made in consideration of natural love and affection for very near relations, is void against a subsequent purchaser, though he had notice of the settlement before his purchase. (u) So a voluntary settlement after marriage may be set aside in favor of a subsequent legal mortgagee though he had notice of the settlement. (x) So a settlement by tenant in fee for maintenance of herself and children for her life, to raise portions for younger children, and the surplus to her heir at law, she then having many sons and daughters, is a voluntary settlement, and void against a purchaser; (y) and the title of a purchaser for

(o) *Ante*, 331, n. (o).

(p) See the sect. Chit. Col. Stat. 388; and see 1 Dow. Rep. N. S. 17; and see in general Cro. Jac. 454; 3 Coke, 82, b.; 9 East, 59; Cowp. 705, 711; 1 New Rep. 332.

(q) 2 Bar. & Ald. 367.

(r) 1 Cox, 278; Cowp. 765.

(s) See several cases, Chit. Col. Stat. 387, notes.

(t) 3 Atk. 377.

(u) 9 East, 59; Cowp. 260.

(x) Cowp. 278; 9 Bing. 76.

(y) 2 Bla. R. 1019.

a valuable consideration cannot be defeated by a prior voluntary settlement, of which he had no notice, though he purchased of one who had obtained a conveyance by fraud, but of which fraud the purchaser was ignorant. (z) But *marriage settlements before marriage*, or in pursuance of a previous agreement, are valid; (a) and the giving up a previous voluntary bond, in consideration of a settlement or conveyance, would prevent it from being considered voluntary. (b) This act only protects persons who can, in the terms of the statute, be deemed *purchasers*. (c) But it extends to *legal mortgages*; (d) and a lessee at rack-rent has been considered as a *purchaser* for valuable consideration, protected by this act; (e) and a purchaser of an *equitable* interest is as much protected as a purchaser of a legal interest. (f) But, at least *at law*, a mere *equitable mortgagee*, by a *deposit* of title deeds, is not a purchaser within the act, and therefore trustees under a voluntary settlement after marriage may, at law, recover such deeds from such mortgagee, leaving him to resort to a Court of Equity; (g) so if a purchase has been made at an *under-value* it would not invalidate a previous voluntary conveyance; (h) so where a purchaser with notice took a collateral security, the previous voluntary advancement to a child was holden good and effectual against such purchase; (i) and to entitle a person to the protection of this statute, he must be a purchaser *bonâ fide*, and for a valuable consideration; (k) but the release of an adverse claim is a sufficient consideration. (l) If the party taking under a voluntary conveyance himself sell the same for a valuable consideration, the prior conveyance cannot afterwards be treated as void, so as to defeat the right of such purchaser. (m)

22. Perfect *Mortgages* on real property or chattels real may be created by either of the deeds we have before noticed; and as far as regards the transfer of the *legal estate*, the same descrip-

22. Legal and equitable mortgages and deposits of deeds, &c. (n)

(z) 1 New Rep. 332.

(a) Id. sect. 4; Cro. Jac. 454; Cowp. 278; ante, 329.

(b) 19 Ves. 218; 2 Taunt. 69.

(c) 1 Dow. Rep. New Series, 17.

(d) Ante, 332, n. (x); Cowp. 278.

(e) 2 Bla. Rep. 1019.

(f) *Buckle v. Mitchell, Pulverton v. Pulverton*, 18 Ves. 90, 100; 1 Ves. & B. 183, 184; *Otley v. Manning*, 9 East, 69; 2 Taunt. 69.

(g) 9 Bing. 76.

(h) Cowp. 705; 1 Ves. & B. 184; 16 East, 212.

(i) 1 Vern. 467.

(k) Cowp. 785.

(l) 2 Taunt. 69.

(m) 2 Vern. 44; 1 Meriv. 638; 19 Ves. 218.

(n) See in general Powell on Mortgages by Coventry; 2 Cruise, 82; and 6 Id. Index, Mortgage; 2 Saund. Index Mortgage; 2 Bla. C. 157 to 160 and notes.

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tion of deed and the same terms are usually adopted as in an absolute conveyance, excepting that a clause of redemption is inserted, and appropriate powers of distress or receivership of the rents, in case of irregularity in paying interest, and ultimately of sale, and covenants for payment of principal and interest at the appointed time, and for title, and against prior incumbrances, with stipulations relative to insurance, cutting timber, &c. (o) It has been usual to grant only a long *term of years* by way of mortgage, so as to avoid the doubts formerly entertained, whether the estate might not become subject to the dower of the mortgagee's wife, and other incumbrances made by him; though that reason has long been removed by the decisions that the land could not be so incumbered. (p) We have seen that assignees of a lease are liable to perform the covenants therein; (q) therefore it is more prudent to take an *under-lease* at a peppercorn rent instead of an assignment, by which means the incumbrancer may avoid most liabilities, as an under-lessee cannot be sued by the lessor. (r) In case of a complete mortgage of a copyhold estate, there must be a regular surrender, presentment, and admittance of the mortgagee. (s) It is advisable on behalf of the mortgagor so to stipulate as to prevent an early or precipitate sale, and avoid the necessity of incurring the expense of three successive applications to a Court of Equity for further time, in case of any unforeseen difficulty in selling. (t)

We have seen some of the incidents of a mortgage. (u) The mortgagor may, at the election of the mortgagee, be treated as a trespasser or as a tenant at sufferance. (r) The mortgagee may sustain ejectment against him without any previous demand; (x) though if the mortgagee accept rent from a tenant in possession under a demise from the mortgagor subsequent to the mortgage, he cannot afterwards treat him as a trespasser, but must, if the rent were accepted as such, give him a notice to quit. (y) Nor could the mortgagee sustain ejectment against a tenant in possession under a lease antecedent to the mortgage,

(o) 1 Jac. & W. 581; 3 Tho. Co. Lit. Waste.

(p) 2 Bla. C. 158.

(q) *Ante*, 319.

(r) Dougl. 183.

(s) *Ante*, 235.

(t) 4 Russ. R. 124; 1 Mad. 287, from which it appears to have been the practice to allow three successive exten-

sions of time of selling, where any reasonable ground can be shown.

(u) *Ante*, 257, and see the observations on *Galliers v. Moss*, 9 B. & Cres. 267, as to the nature of a mortgagee's interest.

(v) *Ante*, 257, 258; 8 B. & Cres. 767.

(x) *Id. ibid.*

(y) 7 Bing. 322.

but may sue him for the rent as assignee of the reversion.(z) If the security be scanty, a Court of Equity will restrain the mortgagor in possession from cutting timber or even under-wood.(a) If the mortgagor become bankrupt, the mortgagee cannot prove for the *whole* mortgage-money and interest, but must petition for the sale of his security, and to be permitted to prove only for the deficiency, and receive a dividend thereon.(b) The 7 Geo. 2, c. 20, intituled "An Act for the more easy Redemption and Foreclosure of Mortgages," enables the mortgagor, when an action of ejectment, or even an action of covenant or debt on mortgage-bond is pending for the non-payment of the principal money and interest, to stay proceedings at law in certain cases,(c) and also contains other provisions for redemption.(d)

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The delay and expense of a regular perfect mortgage gave rise to the now very common practice of creating what is termed an *Equitable Mortgage* by the deposit of title-deeds, with an accompanying agreement to execute a regular mortgage, or by the mere deposit without even any verbal agreement respecting a further security. It is always preferable to have a written agreement signed by the intended mortgagor, and stating the terms of the deposit, as that it is to secure a previous advance of a named sum and of all subsequent advances, and that he agrees at his request to execute all deeds and assurances for mortgaging and conveying the premises as the best and most extensive security that can be framed, and as may be advised and directed by the counsel or conveyancer of the intended mortgagee, with stipulations in the mean time to insure and commit no waste, &c.(f) As the statute against frauds we have seen declares that no interest in real property shall be created otherwise than by a *signed* memorandum, it might excite surprise how the mere verbal deposit of deeds should entitle the party holding the deeds to enforce in a Court of Equity a regular mortgage. The Chief Baron Alexander observed upon that doctrine, "I concur entirely with those eminent persons who

Equitable Mortgages.(c)

(z) Dougl. 183; 3 East, 449; 8 T. R. 2.
(a) 1 Jac. & W. 581; 3 Tho. Co. Lit. 242.

(b) 1 Russ. & M. 185.

(c) 2 Chit. Rep. 264; 7 T. R. 185; 8 T. R. 326, 410; 1 Wils. 80; 3 Bos. & P. 107.

(d) See Chit. Col. Stat. 731, 732, and notes; and 7 Ves. 489; 9 Ves. 36; 1 Young & J. 344.

(e) See in general 2 Powel on Mortgages, 49 to 61; 1 Mad. Ch. Pr. 537;

4 Mhd. R. 249; 1 Bro. C. C. 269; 12 Ves. 197; 3 Young & J. 150; 1 Russ. R. 141; *ante*, 235, of Copyhold; Chit. Eq. Dig. 303, 304, 656; 2 Tho. Co. Lit. 36, note (z).

(f) But the Stamp Act, 55 Geo. 3, c. 184, schedule, Mortgage, requires an *agreement*, accompanying a deposit of title deeds, to be stamped the same as a regular mortgage deed with an *ad valorem* stamp, and hence the practice of a mere *verbal* deposit.

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regret the inroad which the doctrine of mortgage by mere deposit has made upon the wise provisions of the statute against frauds: so far as it has been carried by a course of decisions, I think it my duty to follow, but no further.”(g) Where executors, who are also trustees, agreed to give one of the residuary legatees, as a security for his share, a legal mortgage of real estates, part of the testator’s assets, and for the purpose of having the mortgage prepared, they delivered the title-deeds to his agents, it was held that this gave him an equitable lien on the property as against the executors, though not as against the other residuary legatees.(h) The effect given in a Court of Equity to such a verbal deposit is to compel the execution of a legal and sufficient mortgage, and *vice versâ*, for if a lease be deposited as a security, the landlord may compel the party holding it to accept from the lessee a legal assignment, so as to enable the lessor to sue the deposittee.(i) The deposit creates no legal interest, and if the deposittee take possession of the premises, the assignees of the depositor may support an action of ejectment against him, and compel him to resort to a Court of Equity.(k) We have seen also that the deposit does not, at least in law, constitute the party holding the deed a purchaser within the meaning of the stat. 27 Eliz. c. 4, against voluntary conveyances, and therefore trustees under a voluntary settlement or conveyance may support trover for the deed;(l) and an equitable mortgage by deposit of title-deeds by any accountant of the crown in the hands of one who has an opportunity of knowing that the depositor is or may become a debtor of the crown, is not available against an extent.(m) An equitable mortgage by mere deposit of deeds does not cover prior advances;(n) and a parol agreement to deposit a lease, when granted, as a security for a sum advanced, does not constitute an equitable mortgage so as to create any lien at law or in equity on the lease when afterwards granted.(o) The precautionary measures to be observed by equitable and other mortgagees will be stated in the next chapter.

23. Licenses.

23. In general a *License to use land*, especially if the exclusive right be given, operates as a lease or demise, and must be so

(g) 3 Young & Jer. 161; and see *Licenses*, 337.

(h) 1 Russ. R. 141; 1 Cox, 211; 1 Rose, 374.

(i) *Ante*, 319, 320; 3 Bro. C. C. 166; 1 Ves. J. 235.

(k) 5 Esp. R. 105.

(l) 9 Bing. 76.

(m) 1 Price, 216.

(n) 1 Turn. & R. 274.

(o) 4 Mad. R. 249.

pleaded; (p) but a contract relating to mines may be so worded as not to operate as an actual demise, but merely as a *license to dig*; and we have seen that then the grantee or lessee could not before he had actually opened the mines, nor could he after he had abandoned the same, recover in ejectment or trespass, though it is said that he might whilst he was in actual possession of working mines already opened. (q) In one case it was held that a parol engagement that another party might stack coals on his land, and have the exclusive use of so much land for that purpose for seven years, was valid, as being a mere license of an easement, and not a lease or demise of the land itself; (r) but the propriety of that decision is very questionable. (s) We have seen that as far as respects any *freehold interest* (i. e. for life or longer) in real property corporeal, or ANY incorporeal property, at common law it could only be created by livery of seisin or by deed; (t) and we have seen that the statute against frauds requires that *all leases, estates, interests of freehold, or terms for years, or any uncertain interest* of, in, to, or out of any mesuages, lands, tenements, or hereditaments, must be created by *writing, and signed*, or the same, if verbal, can only have the effect of a lease or estate *at will*, and the fourth section enacts that *any contract or sale of any interest* in the same shall also be in writing, and signed; (u) so that it is obvious that it was the intention of the legislature to deny any effect or operation to a verbal *agreement* to sell, or a verbal making or *transfer* of *any interest* in real property corporeal or incorporeal, excepting in the single case where it could operate as a lease or estate *at will*, now in some cases construed to mean from year to year, determinable by a notice to quit. (x) But it was, soon after passing that act, considered that it did not extend to such *mere easements* as did not constitute any *interest* in the *land itself*, and that the latter might be created by parol, and it was on that principle that the court decided the case of *Wood v. Lake*, (y) in which it was held, that a verbal agreement that a party might *stack coals* on the grantor's land for *seven years* was good, for the court there considered the subject-matter of the license to be merely an *easement*, and not a lease or demise of any interest

(p) 15 Vin. Ab. License, 92; Sugd. V. & P. 74, 75.

(q) 2 Bar. & Ald. 724, 652,

(r) *Wood v. Lake*, Sayer's Rep. 3; see *infra*.

(s) Sugd. V. & P. 8th ed. 74, 75.

(t) *Ante*, 146, 204, 252, note (q); and see 4 East, 106; 5 B. & Cres. 221, 275; 8 B. & Cres. 293; 9 B. & Cres. 479;

7 Bing. 687, 691. As to the operation of a license by deed to dig, &c., see *ante*, 185. A license to use a common can only be by deed, 2 Saund. 327, a.; but see 338, note (d).

(u) 29 Car. 2, c. 3, s. 1; *ante*, 292, 293.

(x) See observations, Sugd. V. & P., 8 ed. 73 to 75.

(y) *Sayer*, 3.

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in the land, and that on that ground the agreement was valid. (z) And that principle has been since acted upon in numerous cases, so far, at least, as to decide that the verbal authority is an excuse for what had been done under it, and also so far as to establish that no action can be supported against the party for *not removing* what he had done, when afterwards required so to do; but it is clear that any supposition that such a license, when it would affect the grantor's *interest* in his land, is not revocable as to *future* purposes, could not be sustained, for if it could, then the relaxation of the statute would hold out a strong temptation to perjury, in swearing to a *permanent* license, which it was the object of the legislature to prevent. (a) It has been held, that a *parol* license to a party to erect a building on his *own* land, whereby an ancient light of the grantor was darkened, was valid, and that, as it had been acted upon, and the building had been erected before countermand of the license, the revocation was afterwards too late, and that no action could be supported either for the original erection, or for the continuance, at least without first tendering the amount of the expenses incurred by the party in so erecting the building, (b) and it has also recently been held that a license to a party to erect a building upon his *own* land, which might be deemed a nuisance to the grantor's house or land after the building had been erected, is so far not recoverable that the grantor could not, after revoking the license, sue the other for continuing the nuisance, because he was under no obligation, under such circumstances, to pull down the building; (c) and, for the same reason, if a person entitled to common of pasture on the waste of the lord give license, though verbally, to another to build a cottage thereon, he could not afterwards sustain an action for the incroachment, although no sufficient common of pasture should be left. (d) In one case it was held, that the grant of a free admission ticket to entitle the bearer to enter a theatre for twenty-one years did not create any interest in land, but merely a license to enjoy the privilege of admission, and that therefore it was not necessary that it should pass by deed, or that the

(z) In that case, a parol agreement was entered into for liberty to stack coals on part of a close for *seven years*, and that during that term the party should have the *sole use* of that part of the close; and Lee, C. J. and Denison held, that the parol license was valid, expressly on the ground that it was only for an *easement*, and not a lease. The error in that decision was upon the *facts*, for clearly the agreement amounted to a parol *lease*; see

cases, 15 Vin. Ab. 92, and Sugd. V. & P. 8 ed. 74, 75.

(a) See Sugd. V. & P. 8 ed. 74, 75.

(b) *Per* Lord Ellenborough, 8 East, 308; and see 2 M. & S. 461, 562; 2 Marsh. 551; 7 Taunt. 374.

(c) *Leggens v. Inge*, 7 Bing. 682.

(d) 1 Car. & P. 141; and see Palmer, 71, and 7 Taunt. 374, to establish that a license, after executed, is not countermandable as to what has been done.

grantor should have been authorized to grant the ticket by the persons in whom the legal interest in the theatre was vested, and it was considered in that case that a beneficial license to be exercised upon land for twenty-one years might be granted without deed, and that such a license, when granted for a valuable consideration, and acted upon, could not be countermanded. (e) But, as forcibly observed, to give absolute effect to a parol license, and hold that it passes a *perpetual* right, or an absolute right even for years, in, upon, or over the grantor's land, so as thereby to part with or prejudice any part of his interest therein, would be in the teeth of the statute against frauds; for if a person could acquire a perfect right by a license, any one has only to get a person to swear to a parol license by the owner of land to build a house upon it, and thereby, without any conveyance by deed, he would acquire, in effect, all the beneficial right of an owner in fee. (f) It should seem, therefore, that, at least as regards a parol license to do any thing upon the land of the grantor, he has a right (at least at law) to countermand it, and afterwards to resist any further enjoyment by the other party under the license, and might, after notice, at least, remove the building erected on his own land under colour thereof. (g) It would, however, be prudent, at least, in all licenses, when so intended, expressly to reserve a right, under prescribed circumstances, to require the removal of the building. (h)

On one occasion, Lord Mansfield said that where a party stood by and saw another building on his land without objecting, he would not suffer him to recover such building in ejectment; (i) but, however a Court of Equity might, under strong circumstances, interfere against such a party by injunction, and decree a conveyance, it is clear that such a doctrine at law is not tenable, and that the strict legal title must prevail, for otherwise the statute against frauds would be rendered inoperative; (k) and all *verbal* licenses, however express, and although founded on valuable consideration, are revocable, and therefore it was held, that an agreement to let a party have a trench for water through the grantor's land, though founded on adequate con-

(e) *Taylor v. Waters*, 7 Taunt. 374; 2 Marsh. 551, S. C.; but *quære* whether that case can be supported.

(f) See observations, Sugd. V. & P., 8 ed. 74, 75.

(g) *Semble*, Id. *ibid*. In *Winter v. Brockwell*, Lord Ellenborough appears to have supposed a right to insist on the removal, after tendering expenses, &c. But

Tindal, C. J. in 7 Bing. 693, 694, seems to have supposed that the party licensing could not have the building pulled down; and see 2 Saund. 113, note (a).

(h) Per Tindal, C. J., 7 Bing. 694.

(i) See observations in *Rex v. Butterton*, 6 T. R. 555; 1 Anst. 185; 5 Ves. 690; 11 East, 57.

(k) Sugd. V. & P. 8 ed, 74, 75.

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sideration, but without any conveyance, amounted merely to a parol license, and was revocable at the will of the grantor; (*l*) and we have seen that where a rector, in consideration of 20*l.*, gave license by parol to make a vault and bury a corpse therein, and engaged that the party should have the exclusive use of such vault, it was held that such parol license was not binding; (*m*) and it is in every-day's experience to reply to and defeat a plea of license by alleging and proving a revocation before the defendant trespassed under colour of a prior license. (*n*)

Secondly. Alienation by matter of RECORD in general.

Secondly. Alienation by matter of RECORD is where the agreement of the parties to convey is sanctioned and perfected by a Tribunal or Court of Record; as by, 1st, Private Acts of Parliament; 2dly, The King's Grants; 3dly, Fines; and 4thly, Common Recoveries.

1. Private acts of parliament.
(*o*)

1. These are frequently obtained in cases of estates of very considerable value, to effect objects which either cannot be, or cannot so well be, attained by private deeds and conveyances; as by a tenant for life, to enable him to charge the inheritance for the amount of necessary repairs and improvements, which must enure to the benefit of the remainder-man and reversioner. But parliament, of course, is the judge whether the proposed repairs and improvements are adequately beneficial to the amount to be charged upon the estate. So private acts are sometimes obtained by a tenant for life, in order to enable him to carry into effect an advantageous conveyance of the fee-simple. (*p*) When a private act is obtained by a tenant in tail, it will bar the estate tail, all remainders, and the reversion on it, although the persons in remainder or reversion should not give their consent to the act; (*q*) and this, although the rights of the remainder-man were not excepted in the saving clause; (*r*) but where a tenant for life enters into an agreement to convey the fee-simple, and a private act is passed for establishing such agreement, in which is a saving of the rights of all persons not parties to the act, it will not affect the persons entitled to the remainder expectant on the life-estate. (*s*) In a common estate bill there is not, in general, any intention to bind third persons,

(*l*) 4 East, 107; but see 7 Taunt. 374.
(*m*) 5 B. & Cres. 221; 8 B. & Cres. 288; ante, 51.

(*n*) 11 East, 451; Com. Dig. Pleader; 3 M. 35, R. 5; 3 Campb. 515; 2 Saund. 113; 8 Taunt. 31; 5 B. & Cres. 221.

(*o*) See in general, 1 Tho. Co. Lit.

27 to 34; Com. Dig. Parliament, R. 7; 2 Bla. C. 344.

(*p*) 3 Wils. 483.

(*q*) 2 Cas. & Op. 400; 4 Cruise's Dig. 520.

(*r*) Ambl. 697.

(*s*) 3 Wils. 483.

but, unless expressly excepted, they may be bound. (t) Private acts are to be construed in the same manner as common law conveyances, and therefore when any doubt arises as to the construction of a private act, the court will consider what was the object and intention of the parties in obtaining the act, and endeavour, if possible, to give effect to that intention. (u) Whenever a statute gives a right, it means a *legal* right, and not to compel the party to enforce it in a Court of Equity; (x) and a private act may be relieved against, if obtained upon fraudulent suggestion. (y)

2. We have, in the preceding pages, seen when these may be presumed. (a) Grants of lands of the crown are placed under restrictions by several statutes. (b) There are particular rules for construing such grants generally in favour of the crown, but to which rule there are some exceptions. (c)

2. The King's grants. (z)

3. & 4. As considerable alterations are expected in the law relating to *finces* and recoveries, we shall merely refer to the works in which the learning on the subject will be found. (d) A fine and nonclaim cannot be pleaded in bar to a bill to prevent the setting up an outstanding term. (e) In the sixth chapter will be shown the proper practical proceedings to avoid a fine. (f) A fine levied by a tenant for years, or copyholder, or owner of any chattel interest, has not any operation on the freehold, and consequently no entry will be necessary to avoid such a fine. (g)

3. Fines, and 4. Recoveries.

In *creating* or *transferring* estates or interests in real property by either of the modes of alienation before noticed, it is essential to consider the right to require, or the expediency and practice of introducing covenants for title or quiet enjoyment. As the *right* to real property is generally to be proved by *written* documents and title deeds, (with the exception of a title for sixty years by *descent* and long *uninterrupted* possession,) a purchaser

COVENANTS for TITLE and QUIET ENJOYMENT. (h)

(t) 7 Bing. 148.

(u) 2 T. R. 701; 4 Cru. Dig. 526.

(z) 1 Sim. R. 499.

(y) 2 Bla. Com. 346; 2 Hargr. *per argum.* 392, Canc. 8, 1773; *McKenzie v. Stuart*, Dom. Proc. 1754; *Biddulph v. Biddulph*, 4 Cru. Dig. 549.

(z) See in general 2 Bla. C. 346, and notes; 2 Tho. Co. Lit. 605, Index, tit. Records.

(a) *Ante*, 284, note (z); 11 East, 284, 495.

(b) See the acts considered, 2 Bla. C. 346, note 4.

(c) See the rule and exceptions, 2 Bla.

C. 366, note 4.

(d) 2 Bla. Com. and notes, 348 to 365; see Cruise on Fines and Recoveries; 1 Preston on Conveyances, 200 to 309; 2 Tho. Co. Lit. 606 to 613.

(e) 1 Sim. R. 349.

(f) *Post*.

(g) 1 Prest. Convey. 301; and see Adams on Eject. 88, 89; *post*, chap. vi.

(h) See *ante*, 295 to 300, as to an agreement of purchase and abstracts; and the perusal of the leading case *Browning v. Wright*, 2 Bos. & Pul. 13, and the notes, 2 Saund. R. 175 to 183, is particularly recommended.

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has a right to examine such documents before he accepts the title, and the maxim is *caveat emptor*, and he ought by due examination and consideration of the title to assure himself that it is legal and sufficient; and although it should, after a conveyance has been completed, turn out that the title of the vendor was defective, the purchaser cannot on that account rescind the contract, or recover back his money, unless he can prove *fraud* on the part of the vendor, or he has had the precaution to take a covenant for the sufficiency of the title; and no purchaser should rely upon such a covenant, for though it binds heirs and executors who *have assets*, yet in the known fluctuation of property, it will be too frequently found, that neither the vendor nor his representative after a lapse of time is of sufficient ability to repay the purchase money; and hence the importance of carefully examining and obtaining the advice of persons of experience in deciding on the sufficiency of a title, especially as any neglect will subject the solicitor of the purchaser to liability to make good the damage. In order to subject the vendor to an action for fraud, it must be clearly established; (i) and in order to recover damages upon a covenant for title or quiet enjoyment, it must be very explicit, and *expressly extend to and cover* the cause of the defect of title complained of. (j)

It is usual in conveyances, when there is a doubt upon the title, either to require a collateral security indemnifying against a particular defect, or to insist upon the insertion of unqualified covenants by the vendor for the title and quiet enjoyment; as that the vendor is seised in fee, has good right to convey, and that the purchaser shall quietly enjoy. In these cases the covenant is general and unqualified, by which the vendor in effect covenants for the title against all the world. In others, when the seeming title on the abstract is sufficient, the covenant is limited and qualified; and usually runs, that "*for and notwithstanding any act or omission done or omitted by the vendor to the contrary, he is seised in fee, &c.*" And it is observable that this qualification against acts of the vendor only, and not of all preceding owners, extends to all the subsequent, and sometimes prior covenants respecting the title, however numerous and verbose; (k) therefore where the covenant relative to the seisin was in the above form, but was followed by a covenant "*and that he had full power to convey, &c.*" the

(i) See *Early v. Garret*, 9 Bar. & Cres. 928, and cases there cited.

(j) Sug. V. & P. 470 to 475, 576 to 593; 2 Saund. Rep. 175 to 183, and notes; 1 Chit. Pl. 131, 132; 2 Chit. Pl.

545, 546; and as to the construction of covenants for a good title, and what constitutes a breach, see 3 East, R. 491.

(k) 2 Saund. 175 to 182, and other cases, *post*; 2 Bos. & Pul. 13.

Court of Common Pleas held, that the latter general form of covenant was either part of the preceding special covenant, or, if not, that it was qualified by all the other special covenants, as well preceding as subsequent, and consequently extended only to acts of the particular covenantor, and did not extend to acts or omissions of *preceding* owners. (l)

The general and unqualified covenant can only, even in the absence of express preliminary agreement, be required by a purchaser or lessee when the title of the vendor is defective, in which case, he must, if required, covenant generally for the title, or against some particular defect of title, or he cannot enforce the bargain; and indeed he cannot, unless the defect were provided for in the conditions or agreement of purchase, compel the purchaser to accept that covenant.

When the vendor claims by *descent* it is usual to restrain the general covenant to acts done by himself or any of his ancestors.

Where the vendor has taken by *devise* or *voluntary* conveyance, (m) and the deviser or grantor took from a vendor who entered into the usual covenants, then the recent vendor may be required to covenant against the acts of himself and of such deviser or grantor; and all who claim under him.

The special qualified covenant is used when the vendor has himself taken by purchase, and has obtained from his vendor the usual covenants for title, to the benefit of which the new purchaser will be entitled as assignee, these being covenants which *run with the land*, even though the word "assigns" be omitted in such covenants. (n)

When *express* general and unqualified covenants for good title are to be introduced they should be carefully framed, so as not only to extend to and cover *acts* and things done or to be done or *suffered* by the covenantor, but also to *omissions*; and care should be observed that they are in such distinct sentences as not to be qualified by any covenant which would confine the stipulation to acts or omissions of a particular party. (o) But as the introduction into the conveyance of a covenant to indemnify against any particular specified defect might prejudice a subsequent sale, it is considered expedient to provide for it by a separate adequate indemnity.

It will be seen that in all these cases the covenants have been

(l) *Browning v. Wright*, 2 Bos. & P. 13; 3 Lev. 46.

(m) As to the voluntary conveyances here alluded to, see *ante*, 332.

(n) 1 H. Bla. 562; 3 T. R. 393, 678.

(o) 3 East, 491; 2 Saund. 175 to 182 in notes; 11 East, 633; 2 Moore, 592; 3 Moore, 703; 1 Brod. & B. 319, S. C.; 4 M. & S. 53; 15 East, 530; M'Clel. Rep. 647.

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express; in some deeds *implied* warranties, or covenants for quiet enjoyment, are *inferred* from *particular* words. The word "*grant*" or "*enfeoff*" create an implied warranty of freehold; (p) though as to lands in Yorkshire the usual covenants for title and further assurance are, by particular acts of parliament, to be considered as expressed by the words "*grant, bargain and sell*." (q)

In a *Lease* the words "*grant*" or "*demise*" are held to amount to a *covenant* for quiet enjoyment, unless afterwards restrained by a qualified *express* covenant; (r) and it may be implied from the lessor's taking on himself to *demise*, (s) upon which an action of covenant would lie by the lessee against the lessor in case of eviction. (t) There is this distinction between *express* and *implied* covenants, that the *latter* are general and unqualified, but the former may be qualified in any manner according to the agreement of the parties. When a deed contains such an *express* qualified covenant, it will restrain the effect of the *general* covenant, which would have given a remedy in case of an eviction from any title paramount to that of the covenantor, for which only the qualified covenant would be a warranty. (u) This, therefore, is one reason why, in many cases, it might be advisable to rely upon the general implied covenant, if there were not another countervailing objection, which induces parties to require an express covenant, which they can induce the lessor to give, *viz.* that the general *implied* covenant is a personal stipulation, continuing only during the continuance of the estate of the covenantor, and determining therewith, whereas by the *express* covenant, the covenantor binds himself, his heirs, executors, administrators and assigns, against either of whom a remedy may be had in any case after the death of the lessor. A case was recently decided which illustrates this position. A tenant for *life* granted a lease for fifteen years, (not warranted by any power,) and which lease did not contain any express covenant for quiet enjoyment, but such a covenant was clearly implied from the word *demise*. The lessor, the tenant for life, died, and after his death the lessee was evicted by the remainder-man, before the expiration of the

(p) *Per* Buller, J., 2 Bos. & P. 26; but see Co. Lit. 384, a. n. 1.; 1 Ves. S. 101; Vaugh. 126; 4 Rep. 80, b.; 4 Crn. D. 52; Hob. 12; 2 Evans's Statutes, 192.

(q) 6 Ann. c. 35; 8 Geo. 2, c. 6.

(r) 5 Rep. 17. See 1 Saund. 322, a., n. (2); 9 Ves. 325; 6 Bing. 656.

(s) 4 Rep. 81.

(t) Cro. Jac. 73; 1 Roll. Ab. 520; 5 B. & C. 609.

(u) 4 Rep. 80, a.; 2 Ld. Raym. 1419; 6 Taunt. 329; 2 Bos. & Pul. 26, where Buller, J. observes, that, contrary to the supposition of many, express covenants are inserted, not for the protection or benefit of the purchaser or lessee, but on the contrary, for the protection of the vendor or lessor, and to qualify the effect of the implied covenant; and see Nokes's case, 4 Coke, 80.

fifteen years; and the lessee brought an action of covenant against the executor of the tenant for life in respect of such eviction, but the Court of Common Pleas determined that such action was not sustainable, because the *implied* covenant *ceased* with the estate of the tenant for life, out of which such lease was granted. (x)

In *Leases* it is usual and proper that the covenant for quiet enjoyment should be general and unqualified, for the lessee usually accepts the lease without being permitted to inspect the title of the lessor, and cannot therefore be supposed to know whether he can safely accept such lease, as regards the lessor's title. (y)

In *Mortgages* the covenants for title and quiet enjoyment are almost invariably unqualified, and it is very proper that they should be so; for a mortgagee is not in the same situation as a purchaser, but lends his money on the faith of the land and the security of the title, and it is therefore but reasonable that the borrower should undertake that the title is absolutely good, and will secure the return of his loan.

In *Settlements*, where the husband received a sum of money or other portion for his own use, from his wife or her relations, it is prudent to require that he should covenant for the title to the property which it is agreed he shall settle without any restriction. But where such settlement by the husband is wholly voluntary, or without return or consideration, (otherwise than that of marriage,) it is not always required that he should enter into such covenants, or perhaps not into any other than a covenant for further assurance; but these things depend upon and are regulated by the confidence which the parties repose in one another, and whether the title has been inquired into, and upon other stipulations of the parties in each particular case.

We have considered the nature and general incidents of real property corporeal or incorporeal when of *Copyhold tenure*. (a)

Thirdly. Alienations by Custom, as in case of Copyholds. (z)

(x) 6 Bing. 656; 4 M. & P. 491, S. C.; see also similar case, Dyer, 257, a.; Bendl. 150.

(y) See 4 Taunt. 329. But *semble*, that the purchaser of a lease may, unless restrained by express covenant, insist on the production of the lessor's title, with some exceptions, Sugd. V. & P. 305 to 311; 2 Bos. & Pul. 23; *Keech v. Hall*, Dougl. 22; 6 Taunt. 60.

(z) See in general 2 Bla. C. 365, and

notes; and see Mr. Sergeant Scrivens's very excellent work on Copyholds, which contains all the law relating to Copyholds; see also Fisher, Watkins, and Cruise, on Copyholds, *per tot.*; 1 Co. Lit. by Thomas, 653 to 676; 2 Saund. Rep. Index, tit. Copyholds, Surrender, and Chit. Eq. Dig. tit. Copyhold; and as to copyhold *tenure* and incidents, *ante*, 232 to 237, 246.

(a) *Ante*, 232 to 237.

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With respect to these, there are, on account of the nature of the tenure, *peculiar modes of Alienation*, (sometimes varying in particular manors, (b)) regulated by the custom *generally* prevailing in *most* manors, (c) viz. by *Surrender* back of the copyholder's estate to the lord, in order that he may regrant the same to another person or persons; *Presentment* of such surrender by the homage, and *Admittance* by the lord of the party in whose favour the presentment was made; and all which proceedings are entered in the *general Court Rolls* of the manor, which in effect constitute a *general register* of the proceedings therein relating to the estates and interests of the copyhold tenants in the order as they arise; and *Copies* of which proceedings are made out by the steward on parchment and delivered to the tenant, and which constitute the secondary or duplicate evidence of his title, and from whence he is termed a *Copyhold tenant*, or tenant by *Copy of Court Roll*. All these, as well as the custom requiring a license from the lord in creating leases or demises for a longer term than one year, were established for the protection of the lord; the *first*, (the *Surrender*,) because, without the lord's consent, no interest in the customary tenement could be passed for more than a year, so that he might know who was to be his *new tenant*; the *second*, (the *Presentment*,) to secure notoriety of the transaction, which could be best effected by the homage finding the fact of such surrender; and the *third* (the *Admittance*) being required as evidence of the lord's assent to his new tenant, and to secure the payment of the fines and fees payable to the lord and steward upon admittance. The full statement of the principle upon which these were required is concisely and clearly stated in the elementary works on this subject. (d) We have seen that these modes of conveyance apply as well to the transfer of *Incorporeal* hereditaments of copyhold tenure as of corporeal, and that even a right to hold a fair or market, or to tithe, &c. may be granted or transferred by copy of court roll; (e) and that a transfer of copyhold cannot in general be effected by feoffment, lease, or release, or fine or recovery; (f) but that a mere *Equitable* interest in copyhold is not properly the subject of a sur-

(b) *Ante*, 232 to 237; and see some modern instances of peculiar customs, Harrison, Index, tit. Customs and Prescriptions, II. Customs of Manors.

(c) These expressions are used because there is not in strictness any *general custom* for all copyholds, though the *like custom* is *generally* prevalent in *most* manors, *Evans*

v. *Glyn*, 6 Taunt. 425; see as to demises for a year without license being a *general custom*, *ante*, 234.

(d) 2 Bla. C. and notes, 365 to 371; and see the works referred to, *supra*, note (z).

(e) *Ante*, 205.

(f) *Ante*, 235.

render, nor can be surrendered, and it should be transferred by *assignment*; (g) and devisees of contingent remainders in a copyhold, not being in the seisin, cannot make a surrender of their interest, nor will a surrender operate against them or their heirs. (h) We have seen when and how an *equitable mortgage* may be effected of copyhold. (i)

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A *Surrender* may be considered as *substantially* the instrument of transfer or conveyance, and the presentment and admittance merely as *formal* measures to perfect it. *It may in general be made by the owner of an estate of inheritance of copyhold to the use of a third person and his heirs generally or in tail, and either in possession, remainder, or reversion, or to the uses of a will made or to be made by the owner. It may be made by the owner appearing in person or (under the 47 Geo. 3, sess. 2, c. 8, (k)) by attorney before the lord or his steward, or by custom before two customary tenants in court, or by custom which is usual out of court, and even out of the manor; (l) and by the delivery of a rod or other symbol in the name of the whole, as directed by the custom, surrendering, or in other words, resigning his estate or interest in a particular customary tenement to the lord, in trust for the intended purposes, as to be again granted out by the lord to such persons and for such uses as are named in the *written surrender*, and according to the custom of the manor. If the use of the entire interest be not declared in the surrender, then the residue of the interest not declared will continue in the surrenderor as of his former estate, (m) and might be resembled to a resulting trust.

The *omission* to surrender to the use of a will; when that surrender is merely a *formal* act, is aided by express enactment, (n) as before it was relieved against in equity in favour of a wife or younger children, or where the estate was devised for payment of debts, (o) though not in favour of a brother, grandchild, or natural children. But that act does not extend to cases where the mode and proceeding by surrender are not

(g) *Aute*, 235, 236; 2 T. R. 484; 2 Saund. 422; and Scriv. Cop. 267.

(h) 11 East, 185.

(i) *Aute*, 235, note (s); 19 Ves. 202; 3 Ves. 582; Chit. Eq. Dig. 30, 34, 656. See observations, Sugd. V. & P. 5 ed. 759, as to when court rolls are not to be deemed notice to a purchaser.

(k) Extended to ancient demesnes by 59 Geo. 3, c. 80.

(l) 1 Salk. 184; 1 Ld. Raym. 76; but

the *admittance* must be within the manor.

(m) 4 Co. 29, b.; 9 Id. 107, a.; 1 Browl. 18; Cro. Eliz. 412; Gilb. Ten. by Watkins, 254, and n. 116.

(n) 55 Geo. 3, c. 192. See Chit. Col. Stat. 180, and notes.

(o) 1 Atk. 387; 3 Bro. 229; 1 P. W. 60; 2 Ves. 582; 5 Id. 557; 6 Id. 544; 1 Fonbl. Eq. 39; Chit. Eq. Dig. Cop.

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matters of form, but of substance; as where a surrender of copyhold by a married woman to the use of her will was required by the particular custom of the manor, in which case the want of her surrender is not aided; (*p*) and the statute saves to the lord the like fees to be paid on admission as if a regular surrender had been made. It should seem that a *general* surrender to such uses as the owner shall appoint, is the most extensive and the best, when it is at the time uncertain what disposition of his estate the surrenderor will ultimately make, for it has been held that after such a surrender the owner may appoint either by deed or by will; and a surrender for the particular purpose of a will was not necessary even before the above statute. (*q*) The beneficial and equitable title of the surrenderee, when for a valuable consideration, begins from the date of the surrender, and after admittance his legal title relates to that time; (*r*) and immediately after the surrender, the surrenderor is merely a trustee for the surrenderee; (*s*) and after admittance the surrenderee is an assignee within the equity of the stat. Hen. 8, and may sue for the breach of covenants entered into with the surrenderor. (*t*) But the surrenderee has no legal interest nor any right to enter before admittance; (*u*) and to enforce the complete transfer of the legal interest and possession he must proceed by *mandamus* to the lord to admit, or by bill in Chancery. (*x*)

2. Presentment. A *Presentment* is only necessary when the surrender has been *out of court*. (*y*) It is to be made in that case by the homage, in order to inform the lord or his steward of what has been transacted out of court, and it must substantially correspond with and truly state the terms of the surrender, for if the surrender were conditional, and the presentment as if it had been absolute, both the surrender, presentment, and admittance thereupon would be wholly void. (*z*) It should properly be made at the next court-baron after the surrender, but by the customs of many manors it may be afterwards; and if a surrenderor die before presentment, it may be made after his death; (*a*)

(*p*) 5 B. & Ald. 492; 1 Dowl. & R. 84, S. C. As to surrender of lunatic's copyhold, see 1 Jac. & W. 642; 3 Swans. 98; Chit. Col. Stat. 180, note (*b*), 692. As to how a surrender should be taken from a *feme covert*, see 4 Taunt. 294.
(*q*) 3 M. & S. 158.
(*r*) 1 T. R. 600; 5 Burr. 2674; 16 East, 208; 2 Saund. 442.

(*s*) 1 T. R. 600.
(*t*) 1 Saund. 241, a.
(*u*) 1 T. R. 600; 2 Bla. C. 368, 369.
(*x*) 2 Roll. R. 107; 2 Bla. C. 369; *post*, ch. x.
(*y*) 2 Bla. C. 366, 369.
(*z*) Co. Copyh. 40.
(*a*) Co. Lit. 62.

and the presentment might be obtained by petition in the court-baron, or enforced in Chancery. (a).

Admittances of copyhold are of three descriptions; *first*, upon a voluntary grant from the lord without any previous surrender, or where a customary tenement has escheated or been forfeited, and the lord afterwards, as we have seen he may do, grants the same to a new tenant to hold of the ancient tenure and upon the same services; (c) or where by special custom parcels of the waste are granted *de novo* to hold as copyhold; (d) *secondly*, an admittance upon a *surrender* by the former tenant; and *thirdly*, an admittance upon a descent from the ancestor.

With respect to the *first*, upon the *re-grant* of an escheat or forfeited copyhold, the re-grant must be upon precisely the same tenure and services as those subject to which it was before held without diminution or addition. (e) The lord's grantee in this case has title without further admittance. (f)

With respect to *admittances* upon *Surrender*, whether upon a conveyance or devise, they are of the most essential importance to vest the legal and perfect right in the surrenderee, for although the lord is a mere instrument, yet until admittance by him the estate remains in the surrenderor, so that if he die before admittance of the surrenderee, the legal estate descends to the heir of the surrenderor; (g) for which reason a surrenderee has no estate to forfeit nor does forfeit for a felony committed before admittance, for till then the estate remains in the surrenderor. (h) But if a surrenderee die before admittance, his heir will in equity be entitled to it, and the widow to free-bench, though not to the legal estate. (i) And where a devise was made by an unadmitted devisee, it was held that the second devisee could not recover in ejectment, because his admittance had no relation to the last legal surrender, but that the *legal* title remained in the heir of the surrenderor, the first testator. (k) The admittance must be to hold the same estate or quantity of interest as that limited by the terms of the surrender, or it will be void. (l) If the lord refuse to admit such surrenderee, the latter may compel admittance by bill in Chancery, (m) or now more usually by motion in the Court of King's Bench for a *man-*

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3. Admittance.
(b)

(a) Co. Copyh. 40.

(b) See in general 2 Bla. C. 370.

(c) *Ante*, 233, n. (l), (m); 2 Bl. C. 370.

(d) *Ante*, 233, n. (i), 347.

(e) Co. Copyh.'s. 41; 8 Coke, 63.

(f) 2 Bar. & Ald. 453.

(g) 5 East, 132; 1 Smith's Rep. 363.

(h) 1 Keny. R. 110; 2 Saund. 422, c., n. 2; 1 T. R. 600; 2 Bla. C. 368.

(i) 2 Saund. R. 422, d.

(k) 7 East, 8.

(l) 4 Coke, 27; 1 Coke, 140; *ante*, 347.

(m) Cro. Jac. 368.

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damus. (n) And though the surrenderee could not, (o) the surrenderor might sustain an action against the lord for his refusal to admit. (p) The lord may by proclamation compel such a surrenderee to be admitted, and if a copyhold be granted for a term of years, it was held that the executor of the termor was obliged to be admitted, and that the lord was entitled to a fine upon such admission. (q) Before admittance such surrenderee has no legal estate but merely a possibility; he could not therefore himself make any efficient surrender, (r) nor make a devise so as to pass any legal interest, (s) nor could the surrenderee before admittance sustain any action founded on the right of property, though if in actual possession, he might, merely in respect of such possession, sue a stranger.

But *after* admittance upon such a surrender, the legal right relates back by legal relations to the date of the surrender, unless it were only prospective in its terms, and on which account it has been held that in an action of ejectment, the day of the demise may be laid at any time after the surrender, though before admittance, provided, before the commencement of the action, there had been a sufficient admittance; (t) and a copyholder may maintain an action of trespass for mesne profits from the time of surrender, after he has been admitted and recovered in ejectment. (u) And after admittance, the surrenderee is considered to be an assignee of the reversion within the stat. Hen. 8, so as to enable him to sue in that character for breaches of covenant entered into with the surrenderor or his ancestors. (x) The admittance of the particular tenant is the admittance of the remainder-man, but the latter may be admitted by himself. (y)

Admittances upon *Descent*, as regards any supposed transfer or perfecting the estate or interest, are wholly *immaterial*, for the heir has as complete a title without it as with it, for he can take possession and maintain every description of personal action or ejectment without ever obtaining any admittance; so that, excepting for the satisfaction of the heir, and to enable him to have the copy of his admittance ready to produce on all occasions, and excepting the securing payment of the fine and fees, the admittance of an heir is not of any utility, on which account the courts formerly would not compel the lord to admit,

(n) 2 T. R. 484.

(o) *Cra. Jac.* 368.

(p) 3 Bulst. 217.

(q) 1 Burr. R. 206; 1 Keny. R. 471,

S. C.

(r) 2 Bla. C. 368.

(s) 7 East, 8.

(t) 6 East, 210; 1 T. R. 600; 4 Burr. 1952; 2 Saund. 422, c., n. 2.

(u) 16 East, 210; 2 Wils. 15.

(x) 1 Saund, 241, a.

(y) *Id.* 147, a.

considering that form as a mere useless ceremony; (z) but now an heir may by *mandamus* compel the lord to admit him; (a) and the heir need not tender himself for admittance at the lord's court, if he has been previously refused by the steward out of court. (b) In order to *compel* the heir to pay the fine, (which is not usually payable until after admittance, (c)) the lord may, by the custom of most manors, compel the heir to be admitted by three successive proclamations for him to come in and be admitted, and if he shall neglect to do so, the estate may be seized and withheld *quousque* the heir appear to be admitted and pay the fine; (d) and after admittance, which is at least equivalent to an attornment, the party admitted cannot dispute the lord's title to the manor. (e) When the party entitled to admittance by descent or under a will is an infant or *feme covert*, the 9th Geo. 1, c. 29, provides against forfeiture and a remedy for the lord's fine, by enabling the lord to appoint a proper guardian to be admitted, and who has powers enabling him to raise and pay the fine. (f)

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By the mutual consent of the lord and his customary tenant, the copyhold estate may be *Enfranchised* and converted into a perfect fee-simple estate, and which may be effected by the lord's *conveying*, mediately or immediately, to the tenant the freehold of the particular or specific premises which were held by copy, or by *releasing* to the tenant his seignorial rights. (g) And if a party by mistake sell an estate as freehold, and a part be discovered to be copyhold, a Court of Equity will give time to the vendor to get the latter enfranchised, so as to enable him to perfect the title to the whole. (h)

Enfranchise-
ment.

The right to transfer an estate or interest in corporeal or incorporeal property of *freehold* tenure by *Will* was first given by 32 H. 8, c. 1, and 34 & 35 H. 8, c. 5, but which only authorized the devise of *two-thirds* of the estate, reserving one-third to the king or the lord, to countervail the advantages derived from wardship, *primer seisin*, &c.; and when those benefits were annulled by the stat. 12 Car. 2, c. 24, it followed that the

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ALIENATION BY
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The statutes
32 H. 8, c. 1;
34 & 35 H. 8,
c. 5.

(z) 2 T. R. 197; Co. Copyh. s. 41; 2 Bla. C. 371, 372.

(a) 3 Bar. & Cres. 172; 4 Dowl. & Ry. 492, S. C.

(b) 2 Mau. & Sel. 87.

(c) 2 T. R. 484; 1 East, 236.

(d) *Ante*, 236; 3 T. R. 162; 5 East, 522.

(e) 5 Bar. & Ald. 626; 1 Dow. & R. 243.

(f) See Chit. Col. Stat. and notes, 176; 3 T. R. 162; 13 Ves. 240, 253.

(g) 1 *Watkins' Copyh.* 362; 4 East, 271; and see 1 Tho. Co. Lit. 676.

(h) Sugd. V. & P. 8 ed. 275, note (II).

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8, c. 5, s. 4.

entire interest in *freehold*, when of *inheritance*, became *devisable*.¹ The power to devise freehold of inheritance and the form of the devise now depend upon the enactments in 34 & 35 H. 8, c. 5, s. 4, and the statute against frauds, 29 Car. 2, c. 3. The former enacts "that all and singular person and persons *having* a sole estate or interest in *fee-simple*, or seised in fee-simple in coparcenery, or in common in fee-simple, of and in any manors, lands, *tenements*, rents, or *other hereditaments*, in possession, reversion, remainder, of *rents* or services incident to any reversion or remainder, shall have full and free liberty, power, and authority to give, dispose, will, or devise to any person or persons, except bodies politic and corporate, by his last will and testament *in writing*, or otherwise by any act or acts lawfully executed in his life by himself solely, or by himself and others jointly, severally, or particularly, or by all those ways or any of them, as much as in him of right is or shall be, *all* his said manors, lands, tenements, or hereditaments, or any of them, or any rents, commons, or other profits or commodities, out of or to be perceived of the same, or out of any parcel thereof, at his own free will and pleasure."

The 29 Car. 2,
c. 3, s. 5, 6.

The 29 Car. 2, c. 3, s. 5, enacts that "all devises and bequests of any lands or tenements devisable either by force of the statute of wills or by this statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be *in writing*, and *SIGNED by the party so devising the same*, or by some other person in his presence and by his *express directions*, and shall be *attested and subscribed in the presence of the said devisor by three or four such credible witnesses*,⁽ⁱ⁾ or else they shall be utterly void and of none effect." And then section 6 enacts that "no such devise in writing, nor any clause thereof, shall at any time be *revocable*, otherwise than by some other will or codicil *in writing*, or other writing declaring the same, or by *burning, cancelling, tearing, or obliterating* the same by the testator himself, or in his presence and by his directions and consent; but all devises and bequests of lands and tenements shall remain and continue in force until

(i) It will be observed that there is a material difference in the words of the 5th and of the 6th section, as regards the circumstances attending the *signature* of the testator. The sixth section expressly requires that the testator should *sign* the revocations *in the presence of the three witnesses*. It may therefore be inferred, notwithstanding the decisions to the contrary presently noticed, that probably the legislature originally intended by the

fifth section, that the testator should actually *sign* his will in the presence of the three witnesses, and the adhering to that requisite would certainly better prevent imposition. Did not the term *attest* require that the witnesses should see the testator actually sign? The words of the two clauses, however, certainly differ, whatever may have been the intention of the legislature.

the same be burnt, cancelled, torn, or obliterated by the testator or his directions, in manner aforesaid, or unless the same be altered by some other will or codicil in writing, or other writing of the devisor, *signed in the presence of three or four witnesses, declaring the same.*" (j)

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Arrangement of
decisions on the
statutes.

The operation of these acts may be conveniently considered with reference, 1st, to the *thing* or property that may be devised under them; 2dly, the *tenure, estate, or interest* therein, and the operation of certain terms; 3dly, the *form* and requisites of a will, and the testator's signature thereof; 4thly, the *attestation* by witnesses; 5thly, construction, operation, and pleading of a will, with the consequences of a devise to an heir, and of revocations, and other points.

1stly. With respect to the property or *thing* that may be devised under these statutes, the terms of the acts are very extensive, expressly including manors, (k) lands, (l) tenements, (m) rents, (n) and other *hereditaments*, (o) the comprehensive import of which terms we have considered at large. The terms include every thing corporeal and incorporeal, the particulars of which have been enumerated. (p) The terms being so comprehensive, it would seem scarcely necessary to refer to decisions. It has been held, that an advowson in gross (q) and tithes (r) may be devised, but that certain franchises cannot. (s) In describing in a will the thing intended to be devised, it is expedient to specify and enumerate the principal messuages, buildings, farms, land, or other property, by the usual and most appropriate description, and then, after the words "with the appurtenances," to add "and all lands, tenements, and hereditaments; commons, ways, watercourses, rights, easements, and advantages whatsoever, now or heretofore usually used, occupied, or enjoyed with the same, whether as part or parcel thereof, or for the better or more conveniently occupying or enjoying the same;" by which means all discussion and litigation respecting the extent of the property intended to be devised, and whether or not a way or other easement were strictly appurtenant, or had not been extinguished as such by unity of seisin or otherwise, would

1. What things
devisable, and
by what words
they pass.

(j) This clause clearly requires that the testator shall sign such revocation in the presence of the three witnesses, and quare, whether that was not the real intent in the prior clause in making a will? See ante, 332, n. (i); 1 Saund. 277, b., in notes.

(k) Ante, 166.

(l) Ante, 179.

(m) Ante, 151.

(n) Ante, 225 to 229.

(o) Ante, 153.

(p) Ante, 145 to 229.

(q) Cro. Eliz. 359; 2 Bla. R. 124.

(r) 6 Cruise, 22.

(s) Id. ibid.; 3 Coke, 32, b.

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be avoided. (t) The terms "effects," (u) or property (v) in *general*, only import *personal* property, and will not in general include or pass real estates, unless there be something in the context of the will to extend the terms beyond their natural meaning; nor will the words "securities for money" pass the legal estate of a mortgage in fee without words of inheritance, or other words denoting a clear intention. (x)

2. Extent of estate devised, and whether legal or equitable, &c.

2dly, *Extent of interest*, or the tenure or estate in the property devised. The act speaks only of estates which the testator *hath* in *fee-simple*, in possession, reversion, or remainder; they therefore do not extend to *copyhold* estates or customary freeholds, the devise of which will be presently separately noticed. (y) It is better, in a devise of real property, to use the words "my estate and interest" in the thing specified, and then to limit or declare what extent of interest the devisee shall take as "to him and his heirs and assigns for ever," or "to him and his assigns during the term of his natural life," &c., by which means all discussion respecting the extent of interest that passes will be avoided. We have considered the extensive meaning and operation of the word "estate," especially in a will, and when a mere devise of the thing, without that word, will pass the fee-simple. (z) By introducing the word "interest," as well as "estate," all possibility of doubt will be avoided; whereas a devise of a "messuage," or of "my estate at B.," without the addition of "*all*" my estate, or "my estate and interest," or adding words expressly denoting the duration of interest, as, "and his heirs," or "for ever," or subjecting the devisee personally to the payment of debts or legacies, will, in general, only give him an estate for life. (a)

But very general words in a will may pass the *largest* interest in real property. Thus, a gift to A. and B. (son and daughter,) "whom I appoint my executors, of *all that I possess in any way*

(t) *Ante*, as to appurtenances, 153 to 159; and as to the comprehensive import of the terms *messuage, ante*, 167 to 169; *curtilage, ante*, 175; *land*, 179, 180.

(u) 1 Russ. R. 482; 2 Maule & S. 448.

(v) 6 Bing. 602 to 611; 1 Russ. R. 479; 2 Marsh. R. 397.

(x) 9 Bar. & C. 267.

(y) 7 East, 299, 322; Chit. Col. Stat. 1121, in notes.

(z) *Ante*, 159, 238, 248, 249.

(a) *Id.* *ibid.* When "my estate at Ashton" passes a fee, see 1 Taunt. 176; 2 Marsh. 15, 113, 117, 359, 397; "all my freehold property" passes the fee, 16 East, 221; and as to the difference

between the word "estate" and "lands," 2 Marsh. 35; 7 East, 259. When an estate in fee or fee-tail passes, although only an estate for life be in terms given, 4 M. & S. 364; 3 M. & S. 522. When the word "estates" passes a fee or a devise over after death to tenant for life, 4 M. & S. 366. Devise to wife of all testator's estate, and, after her death, to the heirs of her body, share and share alike, and in default of issue, &c., she takes only an estate for life, 2 Marsh. 9. Devise of a house after payment of debts only gives a life interest, unless devisee be charged with personal liability to pay the debts, 3 M. & S. 516, 518.

belonging to me, by them freely to be possessed or enjoyed, of whatever nature or manner it may be," was held to pass the fee-simple, those words being equivalent to a gift of all his property, and this, although the testator expressly excepted his household furniture. (b) So a devise of "all my *worldly goods*" may pass a fee. (c) So a direction in a will, that all the testator's children shall share equally in all his *property*, gives them the real estate in fee. (d) But, in such a case, a further general direction for the sale, in a given event, of an estate in fee devised by a will, without expressing by whom it was to be sold, does not give a power of sale to the executors by implication; and if the estate be given to the testator's children, who are under age, the sale must be suspended until they have attained twenty-one, and are competent to convey. (e)

A trust estate, (f) and the legal interest of a mortgagee in fee, (g) and equitable interests (h) as well as legal, in general including an equity of redemption, are clearly devisable, and will pass under the general words in a will passing other estates, unless a contrary intention can be collected from the testator's expressions, or from purposes or limitations to which he has subjected the lands so devised, and which would be inconsistent or improper, if they had reference to trust or mortgaged property. (i) But the estates of a trustee or mortgagee do not pass by any intendment beyond the terms of a devise, which purports merely to devise what is strictly beneficially his own property, and therefore "a devise of all my ready money, *and securities for money*," will not pass the legal interest in fee of a testator, who was a mortgagee in fee. (k) In general, *parol evidence* is not admissible to extend the terms of a devise and enlarge the estate beyond what the words would import. (l)

The testator must be seised, either legally or equitably, *at the time of making his will*. We have seen that a will as to personal property is ambulatory from the time of making it until death, so that, provided the intention of the testator so appear, or there be an express bequest of the residue, then after-purchased or acquired personal property will pass; and the

When testator
... have the
te at the
time of making
his

(b) 4 Russ. R. 348.

(c) 7 Bing. 664.

(d) 1 Jac. & W. 189, 192, note (b).

(e) 1 Jac. & W. 189.

(f) 2 P. W. 258; and see cases cited 9 B. & Cres. 267.

(g) 1 Ch. R. 18; 9 B. & Cres. 267.

(h) 1 Chit. R. 190: The words *having an estate*, &c. in most statutes are construed to include equitable as well as legal interests; see in general, 1 Atk. 573; 1

P. W. 273, and cases on game qualifications, Cald. 230; 9 Price, 257; 3 T. R. 506; 12 East, 263, and Serjeant Williams' opinion, Chit. Game L. 2 ed. 64, 65.

(i) See Lord Eldon's judgment in *Lord Braybrooke v. Inskip*, 8 Ves. 417; 10 Price, 76; and see observations of Baxley, J. in 9 B. & Cres. 273.

(k) 9 B. & Cres. 267.

(l) 3 M. & S. 474; 3 Faunt. 147.

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same rule would include a chattel real, as a term for years; (m) but no *freehold* interest in real property will *at law* pass, unless the testator have the estate therein *at the time of making his will*; not on account of the word "*having*" in the statutes, but on the ground that a devise of freehold is in the nature of a *conveyance*, which cannot operate upon real estates subsequently acquired; (n) and this rule prevails so strongly, that the testator must *continue* to retain until his death, subsequently, the same interest in the land as that which he had at the time of making his will; (o) and a will cannot become operative by the testator *afterwards* becoming interested in land, though specifically devised, (p) excepting by formal *republication* of the will. (q) But provided the testator have, at the time of making his will, a sufficient devisable estate in land, it is not every act or alteration in the nature of his estate will prevent his will from operating. (r) With respect to the words in the first act, *sole seised*, we have seen that a will by a joint tenant before severance of the joint interest is inoperative. (s) The intention of the legislature in using the word "*having*" was to enable not only persons actually seised of a *legal* estate, but also all *beneficial* owners even of equitable interests in possession, remainder, or reversion, to devise the same. In equity, therefore, a purchaser's beneficial and equitable interest in land contracted for, though not yet conveyed, may be devised, (t) also contingent remainders, and all other contingent estates and interests in land. (u) And a possibility, by virtue of an executory devise or a springing use, is devisable. (x)

It has been supposed, upon the same principle, that a person who has been *disseised* cannot devise his interest until he has regained possession; but as a devise under such circumstances could not be attended with the consequences intended to be guarded against by the statute against transfers by *sale* of an estate, where the possession is adverse, (y) it should seem that such devisee might effectually pass his interest by devise. (z)

(m) *Ante*, 110.

(n) *Id.* *ibid.*; 2 Ves. Jun. 427; and see Chit. Col. Stat. 130, 131, and 1120, note (d). It is essential to attend to this reason.

(o) *Id.* *ibid.*; 4 Burr. 1961; 8 East, 552.

(p) Co. Lit. 392.

(q) 4 T. R. 60; Cowp. 364; 6 Cruise, 28.

(r) See cases collected, Chit. Col. Stat. 1120, 1121.

(s) *Ante*, 269; and see 1 Bla. R. 476; 3 Burr. 1468.

(t) 1 Ch. Cas. 39; 9 Mod. 78.

(u) 6 Cruise, 23.

(x) 1 Hen. B. 30; 3 T. R. 86.

(y) See 32 Hen. 8, c. 9, Chit. Col. Stat. and notes, 130, note (a); 1120, note; Evans's Statutes, 451, d.^o A *seisin in law* is in general sufficient, 2 Dowl. & R. 38.

(z) *Id.* *ibid.*; 2 Ves. Jun. 427; but see 1 Taunt. 578; 8 East, 552; 6 Cruise's Dig. 30; Evans's Col. Stat. tit Wills, 451. If it were otherwise, an heir might, by disseisin, readily prevent the party legally entitled from afterwards defeating the descent.

We have seen that an estate *pur autrè vie* is expressly devisable by the last mentioned act. (a)

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And notwithstanding this *rule* at law, that *after-purchased* real property will not pass, it will *frequently* be otherwise in *equity*, when the testator's intention to the contrary must be collected from the terms of the will, and the heir would take advantage of the testator's neglect to republish his will after his purchase, and yet attempt to take any benefit under the terms of the will; and therefore a devise and bequest by a testator of, "all my estate and effects, both real and personal, which I shall *die possessed of*," was held in *Equity* to extend to lands purchased by the testator after the date of his will; and it was held that the heir taking benefits under the will must elect either to give up his claim to such lands or to give up his share of any benefit under the will. (b)

3dly. *With respect to the form of a will.* The statute 34 and 35 Hen. 8, c. 5, s. 4, and the 29 Car. 2, c. 3, s. 5, respectively require it to be in *writing*. But if it were *printed* it would suffice, provided it were duly signed, (d) and probably it would be the same though in pencil. (e)

3. Form of
a will. (c)

The 29 Car. 2, c. 3, s. 5, requires that the will shall be *signed* by the testator, or by some other person *in his presence*, and by his *express* direction; *signature* by *mark* would suffice. (f) It need not be at the foot, for it may be at the beginning or on the side, if written with intent to give effect to the whole instrument, though it is usual and safer to subscribe every distinct sheet of a will. (g) But where a will consisted of several sheets and the testator signed two of them, but from weakness could not sign the rest, the court was of opinion that the will was incomplete, though if he had signed the *last sheet* it might have been otherwise. (h) It has been decided that the signing by the testator in the presence of the witnesses is not requisite, nor is it essential that any of the witnesses should see him sign or even see his signature, (i) though *they* must sign in his presence, or at least in a situation where he *might* see

(a) 29 Car. 2, c. 3, s. 12.

(b) *Churchman v. Ireland*, 1 Russ. & M. 250, confirming 13 Ves. 209, 1 Dow, 249, and qualifying 1 Jac. 534.

(c) See a short form, *post*, 360.

(d) 2 Mau. & Sel. 286.

(e) 5 Bar. & Cres. 234.

(f) 3 Lev. 1; Freem. 538; and see

2 Bos. & Pul. 238.

(g) 3 Lev. 1, 86; 9 Ves. 294.

(h) 7 Bing. 457; Dougl. 241; 4 Ves. 197; 9 Ves. 249; and see 2 Bro. & B. 650; 5 Moore, 484, S. C.

(i) *White v. British Museum*, 6 Bing. 310; 1 Ves. & B. 362; and *Wright v. Wright*, 7 Bing. 457.

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and understand that *they* were signing as witnesses; and it is held to be sufficient if the witnesses can swear that the testator acknowledged his signature to each witness, (*k*) or even *one* witness; and according to the decisions even such an *express acknowledgment* may not be essential. (*k*) *Sealing* is not required, and it should seem that it would not dispense with the omission to sign, because signature is a more certain and permanent mode of testifying assent than the verbal proof of the testator having sealed; and it will be observed, that the statute against frauds throughout its provisions requires the sanction of signature and not that of sealing. (*l*) *No formal delivery*, as "I deliver, or I sign this as my last will and testament," though usual, is requisite, and there is not in the statute one word or expression respecting the *publication* of a will, and therefore it seems quite sufficient if the will has been signed by the testator, and it be also attested by three witnesses in his presence, though at different times; (*m*) and the testator need not describe to the witnesses the instrument as his will, or name what instrument it is; nor need the witnesses know the terms of it, or even whether it be a deed or a will. (*n*) And if the attesting witnesses will neither swear to the sealing or publication, Holt, C. J. held it sufficient to prove their attestation. (*o*) And it was recently held that a will of lands, subscribed by three witnesses in the presence and at the request of the testator, was sufficiently within the statute against frauds, although none of the witnesses saw the testator sign or even saw his signature, and only one of them knew what the paper was. (*p*) It may be questionable, under the terms of the act, whether any communication from the testator is necessary, and whether a will may not be equally valid without either of the witnesses knowing what the instrument was, for the subsequent proof of the testator's handwriting, and those of the three witnesses, would, without any such communication, sufficiently identify the instrument. (*q*)

(*k*) *Ante*, 357, n. (*i*); and *see post*, that even that is not necessary, and that at least an acknowledgment to *one* would suffice; but *see ante*, 352, note (*i*).

(*l*) 2 Ves. S. 450; 1 Wils. 313; 1 Ves. Jun. 11; 17 Ves. 458; 18 Id. 175.

(*m*) 7 Bing. 457.

(*n*) 3 Stark. Ev. 1689, and cases there collected.

(*o*) *Dagwell v. Glascock*, Skin. 413; 1 Stark. Ev. 336. In case of bonds or notes with a subscribing witness, it suffices to prove the handwriting of the

latter, and all the other requisites, if not negated by the witness, will be presumed.

(*p*) *White v. British Museum*, 6 Bing. 310; *Wright v. Wright*, 7 Id. 457.

(*q*) *Peute v. Ogley*, Comyns, 197; and *see Trimmer v. Jackson*, Burn's Eccl. L. But it seems that in general proof is expected of the testator's acknowledgment to at least one witness that the instrument was his will; 6 Bing. 310; 3 P. W. 253; 3 Stark. Ev. Wills, 1686.

4thly. As to the *attestation* and *subscribing* in the presence of the testator by *three* or more *credible* witnesses. Although proof is essential that the will was *attested* by the witnesses in the presence of the testator, it was not necessary that such attestation should be stated on the face of the will, or at the foot. (s) The attestation of an illiterate witness, by making his mark, is a sufficient *subscription*. (t) And although the witnesses must attest and subscribe the will in the presence of the deviser, it is not necessary that they should do so in the presence of each other; (u) and where each of the witnesses, at perfectly distinct times, at his request, signed as witnesses, and neither of them saw the testator sign or saw his signature, and he only told one of such witnesses that the instrument was his will, this attestation was held sufficient. (r) Neither is it necessary that the witnesses should see the deviser sign the will or even see his signature when they attest, provided he acknowledged his signature and that it was his will in their presence, or to one of them; (y) and where the deviser having executed his will in the presence of two witnesses, afterwards produced it to a third and showed him his name, and told him it was his handwriting and desired him to witness it, which he did, it was held that the will was well executed. (y)

Nor is it necessary that the testator should *actually* see the witnesses sign the will; it suffices if it be shown that he was so situated that he *might* have seen them do so. (z) When the

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4. *Attested and
subscribed by
three witnesses
in presence of
testator.* (r)

(r) 2 Bla. C. 376, 377; ante, 252, n. (i).
(s) 4 Taunt. 217; Willes' Rep. 6; Vin. Ab. tit. Devise, N. 9; Bac. Ab. tit. Wills, D. 2; Price v. Smith, Willes' R. 1; 4 Taunt. 217; and per Id. Eldon, *Ranchcliffe v. Parkyns*, 6 Dow, 202.

(t) *Wright v. Wright*, 7 Bing. 457; *Harrison v. Harrison*, 3 Ves. jun. 135; *Addy v. Griece*, Id. 504.

(u) *Wright v. Wright*, 7 Bing. 457; *Smith v. Codrion*, cited 2 Ves. 455; *Grayson v. Atkinson*, 2 Ves. 454; *Jones v. Lake*, cited Atk. 177. See *Stonehouse v. Evelyn*, 3 P. Wms. 253; *Westheech v. Kennedy*, 1 Ves. & B. 362; *Ellis v. Smith*, 1 Ves. jun. 11.

(x) *Wright v. Wright*, 7 Bing. 457.

(y) *Ibid.*; 1 Ves. & B. 362; *supra*, 6 Bing. 318, 320; 7 Id. 457.

(z) *Todd v. E. of Winchelsea*, 1 Mood. & M. 12. The witnesses to a will devising real estates retired and attested the same in an adjoining room, a small part only of which was visible from the bed, in which the testator lay so weak as to be incapable of moving without assistance; it did not appear in what part of the room the witnesses signed the will,

and it was held that the will was duly attested, the jury finding that it was attested in such a place that the testator had an opportunity of seeing, and might have seen it done. Abbott, C. J., in summing up, said, "The single question is, was or was not the will attested in the presence of the testator? What is meant by *presence* may admit of some doubt: it cannot in all cases mean in sight of the testator, because he may have been blind; in that case other circumstances have been held sufficient. In ordinary cases the rule, as I collect it from the authorities [*Doe dem. Wright v. Manifold*, 1 Mau. & S. 294, and cases there cited] is, was or was not the will attested in such a situation as that he might have seen it, if it was attested at the pier table, or at either of the other tables moved into that part of the room which was visible from the bed. It is for you to say whether it is made out to your satisfaction that it was attested in such a place as that the testator had an opportunity of seeing and might have seen the witnesses do it."

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testator desired the witnesses to go into another room, seven yards distant, to attest his will, and there was a window broken, through which he *might* see them, the attestation was held to be sufficient. (a) So where the testator was sick or in bed, though with his curtain drawn. (b) So where the testatrix could see the witnesses through the windows of her carriage and of the attorney's office. (c) Where the testator required the witnesses to set their hands as witnesses to a paper folded up, which they did in his presence, it was considered that this was sufficient, although the testator did not say it was his will; (d) and although it seems in general to have been supposed there should be some acknowledgment by the testator of his signature to the instrument as his will, at least sworn to by one of the witnesses. (e) But it is otherwise if the testator was so situated that he could not have seen the witnesses attest the will; as where they go down stairs into another room, out of the testator's presence, and attest the will there. (f) So if the testator was in a state of insensibility at the time. (g)

An *incompetent* witness is not a credible witness; and upon the trial of an issue or question respecting the validity of a will, evidence of the character and credibility of a deceased witness is admissible. (h) The 25 Geo. 2, c. 6, renders void a legacy given to a witness by a will devising real property, in order to render him a competent witness. (i)

The attestation of a will need not state that the witnesses subscribed their names in the presence of the testator. (k)

(a) *Shires v. Glascock*, 2 Salk. 688; 562; *ante*, 358; 6 Bing. 318. Carth. 81.

(b) Bac. Ab. Wills, D. 1.

(c) *Casson v. Dade*, 1 Bro. Ch. R. 99;

Davy v. Smith, 3 Salk. 395.

(d) *Peate v. Ogley*, Comyns, 197; and

see *Trimmer v. Jackson*, 4 Burn's Ecc. Law.

(e) *Stonhouse v. Evelyn*, 3 P. W. 253; 3 Stark. tit. Wills, 1686; 1 Ves. & B.

(f) *Broderick v. Broderick*, 1 P. Wms.

239; *Doc v. Manifold*, 1 Mau. & S. 294;

Clark v. Ward, 4 Bro. P. C. 71.

(g) *Cater v. Price*, Dougl. 241.

(h) 5 Bing. 435; 3 Moore & P. 4,

S. C.

(i) See Chit. Col. Stat. 1129, 1130,

notes.

(k) Willes, 6; 4 Taunt. 217.

SUGGESTED GENERAL FORM OF A WILL OF REAL PROPERTY, &c.

This is the last will and testament of me, A.B.,* of &c.

1st. Debts and funeral and testamentary expenses charged on real property.

First. I direct that all my just debts and funeral and testamentary expenses may be paid by my executors hereinafter named with all convenient speed after my decease;† and I do hereby subject, charge, and make liable all and every my real and personal estate and effects, whatsoever and wheresoever, to and with the payment of the same, and of the legacies hereinafter bequeathed accordingly.† But I direct that my personal estate shall in the first place be applied in payment, satisfaction, and discharge of my said debts and funeral and testamentary expenses, and of the legacies given by this my will, in exoneration of my real estate.

2. Devise in fee.

Secondly. And I give and devise all my estate and interest of and in all that my farm and lands called Hill Farm, in the county of Norfolk, with the appurtenances, and all

* The will may be in a prospective form, as *ante*, 111.

† These words alone would constitute

an equitable charge on the estate; *Williams v. Chitty*, 3 Ves. jun. 545; 2 B. & Cres. 489.

5thly. The *general construction* of a will is to be the same whether the testator had a legal or only an equitable estate. (l)

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commons, ways, easements, profits, and advantages now or theretofore used or enjoyed therewith,* unto my daughter Emily, her heirs and assigns for ever.

Thirdly. And I give and devise all my estate and interest in that my estate called "The Brooks," in the county of Suffolk, with all &c. (as above), unto my eldest son tail general William and the heirs (if intended to be in tail male, insert the word "*male*," and if in male and female, tail female then the word "*female*,") of his body lawfully begotten.

Fourthly. If it is intended that the heirs in tail of a man by a particular wife should inherit, then say "unto my eldest son William and his heirs on the body of his present wife Mary lawfully begotten."

Fifthly. I give and devise all my estate and interest in my estate at Uxbridge, in the county of Middlesex, called "The Plantation," unto A. B. and C. D. and their heirs, but nevertheless to the uses following, (that is to say,) to the use of my son Thomas and his assigns for and during the term of 99 years, to commence and be computed from the day of my decease, if he shall so long live, without impeachment of or for any manner of waste except wilful or malicious waste; and from and after the determination of the said term by forfeiture or otherwise during the life of my said son Thomas, then to the use of the said A. B. and C. D. and their heirs during the natural life of him my said son, in trust to support and preserve the contingent uses and estates hereinafter limited from being defeated or destroyed, and for that purpose to make entries and bring actions as occasion shall require; but nevertheless to permit and suffer my said son and his assigns to receive and take the rents and profits of the said estate and every part thereof during his life; and from and after his decease,† to the use of the first son of the body of my said son Thomas, lawfully to be begotten, and the heirs male of the body of such son; and for default of issue male of such first son, to the use of the second, third, fourth, fifth, sixth, seventh, and all and every other the son and sons of the body of my said son, lawfully to be begotten, severally, successively, and in remainder one after another, as they shall be in seniority of age and priority of birth, and the heirs male of the body and bodies of all and every such son and sons, the elder of such sons and the heirs male of his and their body and bodies being always preferred to and to take before the younger of such sons and the heirs male of his and their body and bodies; and in default of issue male of any or either of such son and sons, to the use of all and every the daughter and daughters of the body of my said son lawfully begotten or to be begotten, equally to be divided between or amongst them, if more than one, share and share alike, and to take as tenants in common and not as joint tenants, and the heirs of the body and bodies of all and every such daughter and daughters; and in default of lawful issue of any one or more of such daughter or daughters, there being more than one, then as to the part or share of such daughter or daughters who shall have no such issue, to the use of the other or remaining daughters, equally to be divided between them, if more than one, share and share alike, and to take as tenants in common and not as joint tenants, and the heirs of their respective bodies; and in case there shall be but one other remaining daughter, then as to the part or share of the daughter or daughters so failing of lawful issue, to the use of such only remaining daughter and the heirs of her body; and in case there shall be but one daughter of the body of my said son, then to the use of such one or only daughter and the heirs of her body; and in default of such issue of my said son, then to the use of my own right heirs for ever.

Instead of this last limitation to the testator's right heirs, the estate may be limited to his second and other sons successively, and their children and issue in the same way, with an ultimate remainder, in case of failure of issue of any of his sons, to the testator's daughters, in the like manner as the above limitations in point of form.

Sixthly. And I give and devise my house in Lincoln's Inn Fields, in London, unto my nephew G. H. and his assigns for and during the term of his natural life,‡ and from and after the decease of my said nephew G. H., then

6. Devise of life estate in present.

(l) 1 Jac. & W. 573.

* *Ante*, 253.

† Where the son of the testator has children already born, the limitations may, subject to the rule against perpetuities (see *ante*, 243), be still further restricted, viz. to the son for life, remainder to his eldest son by name for life, then to trustees to preserve &c. remainder to the first and

other sons in tail of the grandson, the same as it is here limited to those of the son of the testator, with remainder to the second and other sons of the testator's son, and their issue in tail in the same manner.

‡ As to the words essential to create a life estate, see *ante*, 251, 354; and *Id.* note (a).

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In *pleading* a devise of land, operating under the statute of devises, it must, as well in a declaration as in a bill, be shown

7. Devise of life estate in remainder.

Seventhly. I give and devise the same unto my other nephew *J. K.* in case he shall be then living, and his assigns for and during the term of his natural life, and from and after the decease of the survivor of my said two nephews, then

8. Devise in remainder to females as tenants in common.

Eighthly. I give and devise my said house unto my nieces *E. P.*, *H. P.*, and *J. P.* daughters of my sister *E. P.* or such of them as shall be living at the time of my decease (or "the decease of the survivor of my said nephews *G. H.* and *J. K.*") their heirs and assigns for ever, as tenants in common and not as joint tenants.

9. Bequest of legacies.*

Ninthly. I give and bequeath unto my eldest son my gold watch, chain, and seals.

Tenthly. And I give and bequeath unto my second son my diamond ring and brooch.

Eleventhly. And I give and bequeath unto my friend *P. B.* the legacy or sum of 100*l.*

Twelfthly. And to my friend Mrs. *C. B.*, wife of the said *P. B.*, the like legacy or sum of 100*l.*†

Thirteenthly. I give and bequeath to each of my executors hereinafter named the sum of 50*l.*, as some remuneration for the trouble they will have, to be paid to or retained by them out of my residuary estate.‡

Fourteenthly. I give and bequeath unto *L. M.*, *N. O.*, &c. the sum of 20*l.* each for mourning.

Fifteenthly. I give and bequeath unto each of my servants living with me at the time of my decease the sum of 10*l.* over and above the wages due to them up to the time of their discharge, together with a suit of mourning each; (and so on according to the intentions of the testator) and he may then proceed,

Sixteenthly. And I do hereby direct that all the aforesaid pecuniary legacies may be paid, if convenient to my executors, within the space of six months after my decease, and that such of the said legacies as are given or shall belong to married women, shall be paid to them personally for their separate use, free from the control of any husband, and their receipts shall be a discharge for the same.‡

17. Devise and bequest of Residue.

Seventeenthly. And as to all the rest, residue, and remainder of my real and personal estate and effects whatsoever and wheresoever, not hereinbefore specifically disposed of, over which I shall have a disposing power at the time of my decease, I give, devise, and bequeath the same unto the said *A. B.*, *C. D.*, and *E. F.*, their heirs, executors, administrators, and assigns, according to the nature or tenure thereof, upon trust that they do and shall convert the same into money in such manner as they may think proper, and after payment and deduction thereof of my just debts and funeral and testamentary expenses and the legacies aforesaid, do and shall pay and divide the produce arising from such conversion unto, between, and amongst all and every my sons and daughters who may be living at the time of my decease, and the children of any of my sons and daughters who shall be then dead, in equal shares and proportions as tenants in common; the children of any son or daughter then deceased taking between them the share only which their deceased parents would be entitled to, if then living.

Eighteenthly. And I do hereby declare that the receipts of my said trustees shall be a good discharge to any purchaser who may buy any of the trust property sold by them in execution of the trusts of this my will.

Appointment of executors and trustees, signature by testator, and attestations of witnesses.

Then follow the appointment of the executors, § and powers for their indemnity and the appointment of new trustees. It is advisable to have three or more trustees, to avoid the necessity of frequent substitution of trustees. The signature of the testator and the attestation and signature of the witnesses may be in the same form as adopted in a case of personality, and which we have already considered. ||

* If it be intended to secure the benefit of a bequest from creditors, express terms to that effect must be introduced; see *ante*, 66.

† If for her separate use, see *ante*, 61, n. (a), and *infra*, sixteenth division.

‡ This bequest alone is effectual to preclude the executor from being entitled to the residue.

§ See form, *ante*, 111.

|| See form of attestation, *ante*, 111.

that it was in writing, as that form was prescribed by the very act which gave and qualified the power to devise; (m) but as only a subsequent act, the statute against frauds, introduced the necessity for witnesses, though usual, it is not necessary to aver that the will was attested and subscribed by three witnesses in the presence of the testator. (n)

With respect to a devise to a person who is the heir of the testator, the case of *Doc v. Pratt and Timins* (o) has now established the law to be, that a devise to the heir does not make him take by purchase, although the fee devised to him be made defeasible by executory limitation; a point upon which the authorities were previously contradictory. (p) In other words, the devise to the heir is void, and the will is to be read as if merely containing a future contingent devise to the party in whose favour the executory limitation is made, leaving the fee to descend in the mean time. But if an heir prefer to take by descent, "then a Court of Equity will compel him so to elect, and if he prefer to take as heir, it will not allow him also to have any other property or benefit under the will in derogation of its terms." (q)

A devise of specific lands is not liable to ademption or to pay personal legacies, whether specific or general, although there be deficiency, unless the testator direct otherwise. (r) A devisee may disclaim the benefit, and thereby prevent any estate vesting in him; as where land has been devised charged with payment of debts or legacies; and it is not necessary to make a formal disclaimer in a court of record, and it will suffice to do so by deed, but it may be doubtful whether it could be by parol; (s) and where a devisee refused to take it, saying that he was entitled to it as heir, and would not accept any benefit by the will, it was held that this not being by deed, was not such a disclaimer as to prevent her from afterwards bringing an ejectment, and relying on her title as devisee. (t)

Revocations of a will are express or implied. (u) To constitute an express revocation of a clear devise, the intention to revoke must be as clear as the devise, (x) and an express revo-

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3. Construction
and operations
of a will, &c.
and other
points.

Revocation.

(m) 1 Saund. 276, d., n. 2.

(n) 1 Bridgm. Eq. Dig. 2d. ed. 611, pl. 630; Vern. & Sc. 497; 2 Chit. Pl. 591.

(o) 1 Bar. & Ald. 530.

(p) See *Chaplin v. Leroux*, 5 Maule & Selwyn, 14.

(q) 2 Ves. & B. 190; Chit. Eq. Dig. tit. Heir, 491.

(r) Bligh's Rep. New S. 84; 1 Dow. R. New S. 365.

(s) 5 B. & Ald. 34; 6 B. & Ald. 112.

(t) 6 B. & Ald. 112.

(u) See in general as to revocations, 1 Saund. 277 to 279, in notes.

(x) *Doc v. Hicks*, 8 Bing. 475.

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cation must be either in writing, signed by the deviser in the presence of three or more witnesses, or by burning, cancelling, tearing, or obliterating the will by the testator, or by his direction. (y) The latter must be done *animo cancellandi*, and the intention is a question for a jury. (z) Implied revocation is by marriage and the birth of a child subsequent to the will, even a posthumous child would suffice. (a) But it has been doubted whether the subsequent birth of a child, where the will was made after marriage, can alone suffice. (b)

Devises under
Powers. (c)

Devises under Powers. A feme covert, where lands have been conveyed to trustees, may have the power of appointing the disposition of the lands held in trust for her after death, and which appointment, in the absence of express directions, must be executed like the will of a feme sole, (d) and the appointment by a married woman is effectual against her heir, although it depend only upon the agreement of her husband before marriage, without any conveyance of the estate to trustees. (e)

And where there is a power to charge lands for the payment of debts, or for a provision for a wife or younger children, a Court of Equity will decree a will, though not executed according to the statute, to be a sufficient execution of such power; (f) and the defective executions of wills, in exercise of powers, have been remedied by modern enactment. (g)

Devise of Copy-
hold. (h)

We have seen that as copyholders and customary tenants, (whose interests pass by surrender,) are not seised *in fee simple*, nor hold their lands in socage tenure, it follows that they cannot make a will, or devise *under the statute* of Hen. 8; nor does that statute, or that of frauds, apply to or affect them; and that consequently the requisites of those statutes, as to the form of a will, or the number of witnesses, are wholly inapplicable; (i) though if the terms of the surrender to the use of a will require that it should be signed and witnessed in a specified manner, then, at least before the statute aiding the want of a surrender, such form must have been observed. (j) But at *common law*, or rather by *custom* generally prevailing in most

(y) *Ante*, 352, 353.

(z) 3 Bar. & Ald. 489; 2 Bla. R. 1043.

(a) 5 T. R. 49, 51, n.; 4 M. & S. 10; 5 Ves. J. 656.

(b) *Id.* ib.; and see 2 Bla. Com. 376, note 5.

(c) See Sugd. on Powers, *per tot.*

(d) 2 Ves. 610; 1 Bro. 99.

(e) 2 Ves. sen. 191; 6 Bro. P. C. 156;

2 Eden, 239; 1 Bro. P. C. 486; Ambl. 653; 2 Roper's Husb. and Wife, 180.

(f) Scho. & Lef. 60; 1 Duke, 165.

(g) 54 G. 3, c. 168; Chit. Col. Stat. 856, and notes; and see Sugd. on Powers, 2 ed.

(h) *Ante*, 345 to 35

(i) 7 East, 299, 322; 1 Russ. R. 482.

(j) *Id.* ibid.; 2 P. W. 258; 2 Atk. 37.

manors, copyholders of inheritance may surrender the same to the uses declared in their wills; and it has been held that a custom to the contrary was void; (*k*) and since the 55 Geo. 3, c. 192, dispenses with a surrender to the use of a will, (excepting in the instance before noticed, where the surrender by a married woman was of the substance of the conveyance,) a copyhold will pass under a general devise of real estates, although there were no surrender to the use of the will, and although there were only two witnesses; (*l*) and equitable as well as legal interests pass by general words, and the terms of a will of copyhold are construed the same as those in a will of freehold; (*m*) and though under the words of the statute of wills, after-purchased freehold will not pass under a prior will, unless it be afterwards republished, it is otherwise as to copyhold, for if a man make a disposition by will of all his copyhold estates *generally*, and afterwards purchase other copyhold estates, and surrender them to the uses declared by his will, or even to the uses declared by his will of and concerning *the same*, the after-purchased estates will pass under the general devise, although the will was not republished. (*n*) But it seems that a surrenderee of copyhold cannot, *before admittance*, devise, at least so as to pass the *legal* interest to the devisee (*o*).

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VII. Many of the *distinctions* between *legal* and *equitable* estates and interests, as well in personal as in real property, have been shown in the preceding pages; but there are some others essential to be kept in view; and though this chapter relates principally to *Real* property, it is expedient at the same time to consider equitable interests in *Personalty*; and *first*, *Personalty*; *secondly*, *Realty*.

VII. The distinctions between *LEGAL* and *EQUITABLE* rights, interests, and estates. (*p*)

1. It will be observed, that the title to *personalty* is usually *legal*, and consequently more simple than the title to *realty*; but the interest in *personalty* *may* be *equitable*; and in that case many of the principles affecting equitable interests in real property equally apply. Thus if a bond or other contract under seal be made to *A.* for the *use* of *B.*, the latter has no

1. As to *Personalty*.

(*k*) 3 Bro. C. C. 286; 15 Ves. J. 396.
(*l*) *Doe v. Ludlam*, 7 Bing. 275; 1 Russ. R. 482; *ante*, 347, 348.
(*m*) *Id.* *Ibid.*; 2 Atk. 57.
(*n*) Cowp. 130; Loft, 604; 8 Ves. 256;

Sug. V. & P. 8 ed. 173; 10 B. & Cres. 85.
(*o*) 1 Madd. 632; 7 East, 8; *King v. Turner*, 2 Sim. R. 545.
(*p*) See the divisions of the subject, *ante*, 145, 147, 307, 320, 321, 324.

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legal but only an equitable interest, and he could neither sue at law nor release the contract. (p) So if a deed be *inter partes*, that is, professedly made between two or more persons, then no person who is not stated therein to be a party can sue at law upon a stipulation therein, although expressly for his benefit; but the action must be in the name of the covenantee. (q) And if a bill of exchange be in terms payable to A. for the use of B. the latter cannot sue thereon. (r) In the case of a deed-poll, not *inter partes*, if the covenant therein be generally to pay B., or it be expressly with him to pay him money, then he might sue in his own name, although he did not execute the deed, and were in all other respects a stranger to it. (s) And in the case of contracts *not, under seal*, there are instances in which it has been held that upon a promise in fact made to A. to pay money or deliver goods to C., the latter might sue in his own name for the breach; (t) though it is said that in declaring, the contract to pay, or deliver should be alleged to have been made to the plaintiff, and that the promise, though in fact made to A., would be evidence in support of that allegation. (u) However, it should seem that whenever by the terms of a contract the party to whom the engagement is made is to be a trustee for another, the legal interest and right to sue is vested only in him, and he alone can sue. (x) But these rules, it should seem, do not preclude assignees of a bankrupt from suing at law his trustees, who have received dividends of stock which was vested in their names for his use. (y) Where there has been a bequest of a specific legacy, the legal interest remains in the executor until he has assented; and the legatee could not sue at law for or in relation to such bequest; (z) though after such assent the legal interest would vest, and the legatee might sue even the executor. (a)

So with respect to goods or any *personal tangible chattels*, if the legal interest therein be vested in A. as a trustee for B.,

(p) 2 Inst. 673; 1 Lev. 235; 3 Id. 139; 3 Bos. & P. 149, n. (a); 1 East, 301; 7 East, 148; 1 M. & S. 575; 1 Saund. 153; 2 Sand. U. & T. 222; 6 Vin. Ab. Covenant, 374; see the rule and principle, *ante*, 6, 7.

(q) 2 Inst. 673; 2 Rol. Ab. Faits, F. 1; 3 M. & S. 308, 322; 5 Moore, 23; 2 Bos. & P. 333; 5 B. & Cres. 355; 2 Prest. on Conv. 184; Platt on Conv. 7, 8.

(r) Carth. 57; 2 Ventr. 307; 1 Esp. R. 231; 6 T. R. 125; 1 M. & S. 725; 1 Bos. & P. 101, note (c).

(s) 2 Lev. 74, Com. Dig. Covenant,

A. 1.

(t) *Dutton v. Poole*, 1 Ventr. 318, 332; 2 Lev. 210; 5 Moore, 31; *Marchington v. Vernon*, 1 Bos. & P. 101, n.; and see observations in *Carnegie v. Waugh*, 2 Dowl. & R. 277; 1 Chit. Pl. 5 ed. 5, 6, note (b); but see *Crow v. Rogers*, 1 Stra. 592.

(u) *Per Eyre*, C. J. 1 Bos. & P. 102.

(x) Carth. 5; 2 Ventr. 307.

(y) *Allen (assignee) v. Impell*, 8 Taunt. 263; 2 Moore, 240, S. C.; but see the case at Ni. Pri., Holt, C. N. P. 641, *cont.*

(z) 7 B. & Cres. 542; *ante*, 112.

(a) 3 East, 120.

and it be essential to adopt a form of action in which the *right of property* comes in question, as in *trorer*, the proceeding must be in the name of *A.*, and not of *B.*; and the latter could not sue such trustee, or even a stranger, (*b*) though he might when in actual possession at the time of the injury sue a stranger for such injury, as possession is a sufficient title against a mere stranger. (*c*)

Where goods have been mortgaged or pawned, and are in the possession of the mortgagee, he has the legal interest, and in strictness the beneficial interest could not be legally seized or sold under an execution against the mortgagor; (*d*) and though it is said that on payment of the money due or subject to the charge the equitable interest might be seized or sold, it does not appear that there has been any solemn decision to that effect. (*e*)

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2. With respect to *real* property and *chattels real*, the difference between legal and equitable interests are exceedingly important, and may be considered, *first*, with reference to the general consequences independently of legal proceedings; and *secondly*, with respect to actions and other proceedings. Under the *first* we have noticed one instance, that of the widow of an owner, who had only an *equitable* right, not acquiring a settlement as guardian in socage, because that character is only acquired in cases where the *legal* as well as the beneficial interest vests in the infant heir. (*g*) At *Law* only *legal* rights can be considered. (*h*) Again: a heriot is only payable upon the death of a *legal* owner, and not on the death of *cestui que trust*, (*i*) and many questions upon the distinction between legal and equitable interests frequently arise under the *Poor Laws*. (*j*) But *collaterally* and *independently* of actions and legal proceedings, the legislature and the courts for most purposes notice and consider the person *beneficially* interested, whether as *cestui que trust* or as mortgagor, as substantially

2. As to real property and chattels real. (*j*)

First. Independently of legal proceedings. (*f*)

(*b*) Holt's Cas. N. P. 641; 3 Taunt. 263; 2 Moore, 240, where see qualifications of the rule; 8 T. R. 322; 3 Campb. 417; 2 Bing. 2; 1 Sand. U. & T. 222.

(*c*) See principle, 2 Saund. 47, d.; 1 East, 244.

(*d*) Tidd, 9 ed. 1003; Bro. Ab. tit. Pledges, 28.

(*e*) Id. *ibid.*; in Tidd, 9 ed., referring to Bro. Ab. tit. Pledges, pl. 28, and 3 East, 476, 479, and 15 East, 607, the right to sell, subject to the lien, is supposed to exist, and in 8 East, Mr. Richardson so argued; but *quære*, if any express decision to that effect took place; certainly

a mere *equity* of redemption in a term for years cannot be seized or sold under a *fi. fa.* even on the sheriff's paying off the mortgage, 8 East, 467; 2 New R. 461, and Tidd, 1003.

(*f*) As to when a *use* is not executed, *ante*, 322 to 325; and as to conveyances of equitable interests, 307, 320, 321, 324.

(*g*) *Ante*, 8; *Rex v. Toddington*, 1 Bar. & Ald. 560, and Burn's J. Poor.

(*h*) *The King v. Wilson*, 10 B. & C. res. 87.

(*i*) 1 Vern. 441.

(*j*) See Burn's J. Poor, 26 ed. 589 to 636.

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the owner, and afford him, whilst he retains a *sufficient beneficial* interest in the property, *substantially* the same rights as if he were the legal owner. Thus we have seen that the words in the statute of wills, "persons *having* an *estate* or interest in fee simple," are construed to include equitable as well as legal estates. (*k*) So the prohibition from killing game, against persons "not *having* lands and tenements of the value of 100*l*." were construed to include mere *equitable* or beneficial interests in land, where the legal estate was vested in a trustee or mortgagee; (*l*) and many other instances might be referred to. (*m*) So although the *trustee* or legal owner of a manor might appoint a gamekeeper to *preserve* the game, that being consistent with the nature and duties of a trustee, yet it should seem (at least in equity) that he could not appoint a gamekeeper to *kill* game for his own benefit. (*n*)

Some statutes even expressly reserve or declare the right of a mere beneficial owner, as the 7 Wm. 3, c. 25, s. 7, which allowed the *cestui que trust* to vote at elections for knights of the shire; and the Reform act (*o*) enacts that no person shall be allowed to have any vote for a county member for or by reason of any trust estate or mortgage, unless such trustee or mortgagee be in actual possession or receipt of the rents and profits of the same estate, but that the mortgagor shall and may vote for the same estates, notwithstanding such mortgage interest.

With respect to *trust estates* in general, and uses not executed or vested under the statute of uses, the trust or equitable estate is considered, for most beneficial purposes, as equivalent to the legal estate, (*p*) and the *cestui que trust* has in most respects equal powers over the trust estate, as a party in whom the *legal* estate and the *beneficial* interest continue, though he may not be able to enforce the full benefit of those powers, except in a Court of Equity. Thus a trust estate and an equity of redemption may be *aliened* by the *cestui que trust* or mortgagor, and any usual *legal* conveyance or assurance executed by the former has, in equity, substantially, and as far as respects all beneficial purposes, the same effect and operation upon the trust as it would have had at law upon the legal

(*k*) 34 & 35 Hen. 8, c. 5, s. 4; *ante*, 355, 356; 2 P. W. 258; 1 Chan. R. 18, 190; 2 Ves. & B. 385; Dougl. 718.

(*l*) Cald. 230; Chit. G. L. 63, 64; *ante*, 355, n. (*h*).

(*m*) *Ante*, 355.

(*n*) 7 Ves. 488; Cald. R. 230.

(*o*) 2 Wm. 4, c. 45, s. 23.

(*p*) 1 Ves. 357; Sand. U. & Trusts; Sugden's ed. Gilb. U. & T. *per tot*.

estate, supposing it had been vested in him. (g) But when the *equitable* interest is of such a nature that if it had been a *legal* estate it could not have been conveyed without the aid of a fine or recovery, then the owner of such *equitable* interest must use the same kind of assurances by matter of record, in the transfer of his beneficial interest, as if it had been a legal estate; thus the equitable rights of tenant in tail and of married women must be conveyed by fine or recovery. (r) And a common recovery suffered by a *cestui que trust* in tail in possession will bar all equitable remainders depending upon such estate tail, although there was no legal tenant to the *præcipe*. (s)

The equitable interest of a *cestui que trust* or mortgagor may be *devised* precisely the same as a legal estate. (t) If not devised, the same *descends* precisely as a legal estate, and this whether the tenure be customary, as borough-English, or gavelkind, or otherwise, (u) and there may be a *possessio fratris* of a trust. (v) So a trust estate may be *entailed*, and which, as just stated, can only be barred by fine or recovery, which will have the same effect upon an equitable as upon a legal estate. (x) So a trust estate may be limited to a person for life, and in such case a fine or other assurance by the *cestui que trust* for life will not operate as a forfeiture of his estate. (y) So trust estates are subject to *curtesy*, (z) unless where the husband is excluded by an express agreement or trust for the separate use of his wife. (a) But a trust estate is not subject to dower, which is the reason why, upon a purchase by a husband during coverture, care is usually observed, by the intervention of a trustee, to prevent any legal estate vesting in him of which the wife would be dowable. (b) We shall state the effect of *executions* against trust estates when considering how they affect proceedings at law, (c) and if an equitable title has not been acted upon the same as the legal should, we shall find that it is barred by analogy to the statutes of limitations. (d)

(g) *North v. Champerton*, 2 Chan. Cas. 63, 78; *Botteler v. Allingham*, 1 Bro. C. C. 72.

(r) 1 And. U. & T. 273.

(s) *North v. Way*, 1 Vern. 13; *Burnaby v. Griffiths*, 3 Ves. 276; *Wykhan v. Wykhan*, 18 Ves. 412; see further, 1 Prest. Conv. 23.

(t) *Greenhill v. Greenhill*, 2 Vern. 680; ante, 355.

(u) *Banks v. Sutton*, 2 P. Wms. 713, 736; 2 Ves. 304; *Caldecot's R.* 230.

(v) 2 P. Wms. 713, 736.

(x) *Kirkman v. Smith*, Anbl. 518; 2 P. Wms. 133.

(y) 3 Atk. 728; 2 P. Wms. 146.

(z) 1 P. Wms. 108; 3 P. Wms. 234; 1 Atk. 603.

(a) 3 Atk. 695, 716; 1 Ves. 298.

(b) *Dixon v. Saville*, 1 Bro. C. C. 326.

(c) *Post*, 371, 372.

(d) *Medlicot v. O'Donel*, 1 Bro. C. C. 167; *Hovendon v. Lord Annesley*, 2 Sch. & Lef. 630; *Bonny v. Ridgard*, 4 Bro. C. C. 138, 125; *Beckford v. Wade*, 17 Ves. 87, 97; *post*, ch. ix.

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Secondly. With respect to actions and legal proceedings.

As respects *actions* and *suits at law* for the recovery of real property or chattels real, or for injuries to the same, and in which any question respecting the *right* is to be tried, the proceeding must be in the name of the *legal* owner, and not of a party who has only an *equitable* interest; (c) though the latter, when in *actual possession*, may sue a *stranger* for an immediate injury to his possession, because in the latter proceeding the mere proof of possession suffices, and without investigation of the real ownership and even without any actual right, is considered sufficient to enable a party to sue a mere *trespasser*. (f) In actions of ejectment (which are founded on the *legal right* of property) the count must always be on the supposed demise of the *trustee*, in whom the *legal* interest and immediate *right* of possession is vested, and not upon the demise of the *cestui que trust*, or of a party having the *equitable* interest, unless he also have a *legal* right of possession; (g) though a *person* in actual possession, even under a void lease, at the time a trespass has been committed, might support an action for such trespass. (h) And it is settled that a *cestui que trust* cannot in any case sue his *trustee* at law, even for the most malicious waste to the property in which he is beneficially interested, but must proceed in a Court of Equity to prevent or obtain compensation for the injury, (i) and a mere equitable mortgagee by *deposit* of deeds would stand in the same situation; whilst *e converso* the trustee might at law support ejectment even against his own *cestui que trust*. (k) The same rule applies to *legal reversions*; thus if there be a tenant for years in possession, and there be a mortgagee or a trustee for a term, in whom the *legal* interest in reversion is vested, the latter, and not the mortgagee or *cestui que trust*, would be the proper party to sue the hundred for the felonious demolition of buildings, (l) though sometimes, by concealing the mortgage or deeds passing the legal interest, the party having only the *equitable* interest might succeed in such action. (m)

A mere *equitable* interest or *equity* of redemption in a *term for years*, cannot be taken in execution under a *fieri facias* against the party beneficially entitled. (n) And, therefore,

(c) 7 T. R. 47, 50; 8 T. R. 118; 10 B. & C. 87; see the *principle*, *ante*, 6 to 8.

(f) 1 East, 244; Willes, 221; 3 Burr. 1563; 1 Taunt. 83, 190; 8 East, 394; 5 B. & Ald. 600.

(g) 7 T. R. 47, 50. The instances, *ante*, 317, in which the *surrender* of a legal term vested in a trustee may be presumed, constitute exceptions.

(h) *Supra*, n. (f).

(i) 8 T. R. 118.

(k) *Doe v. Reid*, 8 T. R. 118.

(l) *Pritchit v. Waldron*, 5 Term R. 14.

(m) 9 B. & Cres. 154.

(n) 8 East, 467; 2 New R. 461; 3 Bro. C. C. 48; 1 Ves. J. 431; Tidd, 9 ed. 1003. As to a *freehold* lease, see *Comberbatch*, 291.

when the defendant has only an equity of redemption in a leasehold estate, an execution will not affect it, as the legal estate is in the trustee or mortgagee; (o) and the judgment creditor's only remedy in that case is by filing a bill in equity to redeem the estate by paying off the mortgage incumbrance; (o) and before so redeeming, it is said,* he must first issue a *fieri facias*, (p) though it is not necessary to show it to have been returned. (q) It has been decided that a trust of a term for years is not within the statute 29 Car. 2, c. 3, s. 18, (presently stated,) because that act only extends to trusts of land in fee; (r) and courts of law so far take notice of equitable interests and qualify those that are legal, as to hold that when it is clear that a term is merely for trust purposes, as if it be a term for 2,000 years, they will construe it not to be a mere lease but a trust term to attend the inheritance, and not to be subject to be taken in execution, or sold under an execution against a trustee who has no beneficial interest under the same. (l)

As respects the effect of an *elegit* or *extent* against *freehold equitable* interests in land, Mr. Tidd thus distinctly states the law. (u) "At common law, if a man was seised of the legal estate in lands to the use of or *in trust* for another, against whom a judgment had been obtained, or who had entered into a statute or recognizance, these lands were not liable to execution upon the judgment, statute or recognizance of *cestui que trust*." (x) But the 29 Car. 2, c. 3, s. 10, altered the law in this respect, and enacts that, "it shall be lawful for every sheriff or other officer, to whom any writ or precept is directed at the suit of any person or persons, of, for, and upon any judgment, statute or recognizance, to do, make, and deliver execution, unto the party in that behalf suing, of all such lands, tenements, rectories, tithes, rents and hereditaments, as any other person or persons are in any manner *seised* or *possessed in trust* for him against whom execution is so sued, like as the sheriff or other officer might or ought to have done, if the said party against whom execution is so sued had been *seised* of such lands, &c. of such estate as they are seised of in trust for him *at the time*

(o) 3 Atk. 200, 739; For. 162; 8 East, 476; Moore, 281; 1 Brod. & B. 506.

(p) 3 Atk. 200; 1 Vern. 399; 1 P. W. 445; 6 Ves. 72; 1 Mad. Ch. Pr. 205, 522.

(q) Lord Redesd. Pl. 3d. ed. 102; 1 Mad. Ch. Pr. 205.

(r) 2 Vern. 248; and see 2 Saund. 5 ed.

11, n. 17; 8 East, 476, 486; Tidd, 9th ed. 1036.

(s) Cowp. 595.

(t) *Quare*, *Id. ibid.*

(u) Tidd, 9th ed. 1035, 1036.

(x) Co. Lit. 374, b.; 2 Saund. 5th ed. 11, n. 17.

CHAP. IV.
I. RIGHTS
TO REAL
PROPERTY.

of the said execution sued, which lands, &c. by force and virtue of such execution, shall accordingly be held and enjoyed freed and discharged from all incumbrances of such person or persons as shall be so seised or possessed in trust for the person against whom such execution shall be sued; and if any *cestui que trust* shall die, leaving a trust in fee simple to descend to his heirs, then and in every such case such trust shall be deemed and taken and is thereby declared to be *assets* by *descent*; and the heir shall be liable to, and chargeable with, the obligation of his ancestor for and by reason of such assets, as fully and amply as he might or ought to have been, if the estate in law had descended to him in possession in like manner as the trust descended." The words in the act, "*at the time of the said execution sued*," are held to refer to the seisin of the trustee, and therefore if he has conveyed the lands by the direction of *cestui que trust* before execution, though seised in trust at the time of the judgment, the lands cannot be taken in execution.(y) And a trust created by a defendant in favour of himself and another person is not a trust within the meaning of the above statute, which is confined to cases where the trustees are seised or possessed in trust for a defendant *alone* and not jointly with another person.(z) An equity of redemption cannot be taken in execution on the above statute,(a) though it is deemed assets;(b) and therefore when the estate is mortgaged, the plaintiff's remedy is by filing a bill in equity to redeem, which he is entitled to do, on payment of principal, interest and costs.(c) But an *elegit* must be first sued against the defendant and delivered to the sheriff,(d) though it does not seem necessary to have it returned.(e) And it is holden, that if a man be *cestui que trust* of a *term*, it is not assets within the statute, which extends only to a trust of lands in *fee*.(f) An equity of redemption, however, may be taken under an *extent*."(g)

Under an *extent*, the *crown* may take not only the legal estate of the debtor, but also trust estates,(h) or an equity of

(y) Com. Rep. 226; Com. Dig. tit. Execution, C. (14); and see 4 Bing. 335.

(z) 4 Bar. & Ald. 684; and see 4 Bing. 96, 335.

(a) 3 Atk. 200, 739; 1 Ves. J. 431; 3 Bro. C. C. 478, S. C.; 8 East, 467; 2 New Rep. 461.

(b) 2 Freem. 115; 2 Atk. 290; and see Toller's Ex. 1st ed. 415, 416.

(c) Powel, Mortgages, 1st ed. 99; and see For. 162; 1 Mad. Ch. 522, 523.

(d) 3 Atk. 200; and see 1 Vern. 399; 1 P. Wms. 445; 6 Ves. 72; 1 Mad. Ch. 205, 522, 523.

(e) Lord Redesdale, Pl. 3d ed. 102; 1 Madd. Ch. 205, n. (r).

(f) Fleetwood's case, 8 Coke, 71; 2 Vern. 248; and see 2 Saund. 5th ed. 11, n. (17); 8 East, 474, 486.

(g) For. 162, 163; 1 Price, 207.

(h) West on Extents, 129; Tidd. 1050; but see Carth. 5.

redemption; (i) and if the extent be against several, the lands of all or any of them are liable to be seized. (k) But we have seen that no interests in lands of *copyhold* tenure are liable to be seized either under an *elegit* or an *extent*; (l) although every description of beneficial interest, whether legal or equitable, as well in freehold as copyhold property, is liable to be sold under a commission against a bankrupt, or by an assignee of a discharged insolvent. (m)

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I. RIGHTS
TO REAL
PROPERTY.

In the early parts of this chapter, when enumerating the different descriptions of real property corporeal, and the different interests therein, we have noticed the civil and most of the criminal injuries which usually affect each, and the modern remedies and punishments, (n) and when considering the *times of enjoyment* (as whether the estate be in possession, remainder, or reversion, (p)) and the *number of owners*, (as parceners, joint tenants, and tenants in common, (q)) we stated how those circumstances varied the civil remedies and criminal punishments; and other remedies and punishments have been noticed in preceding pages, but still it is expedient, in concluding this chapter, to take a *practical* view of all the civil remedies and criminal punishments that can be applicable to any interest, legal or equitable, in real property or chattels real, with the exception of *Real actions*, which we will reserve for future consideration, when we state the practice of the Court of Common Pleas in particular, where those remedies must be pursued.

II. & III. IN-
JURIES, OFFEN-
CES, REMEDIES,
and PUNISH-
MENTS relating
to REAL PRO-
PERTY. (n)

From the distinct natures of corporeal and incorporeal property, and in respect of the latter not being tangible, there is a very marked distinction between the injuries and remedies affecting them, and therefore we will *first* consider the injuries, civil and criminal, affecting real property *corporeal*, and the appropriate remedies and punishments; and, *secondly*, the injuries, remedies, and punishments relating to real property *incorporeal*. In considering these, our object will be to give a *practical outline*. The particulars of each remedy will be better examined in a subsequent part of the work.

Division of injuries and offences into those to corporeal and those to incorporeal property.

(i) For. 162; 1 Price's R. 207.

(k) West, Extents, 136.

(l) *Ante*, 235; 1 Rôl. Ab. 888; 2 Bar. & Cres. 242, 243; 3 Dowl. & R. 603; Parker, 195; Tidd, 9th ed. 1050.

(m) *Ante*, 235.

(n) See division, *ante*, 145.

(o) *Ante*, 151 to 203.

(p) *Ante*, 266 to 268.

(q) *Ante*, 268 to 270.

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II. & III. INJURIES TO REAL
PROPERTY.

The *civil* injuries to real property *corporeal* are such as affect the possession or *right of possession*, or a right in *remainder* or *reversion*. The former are, 1st. *Ousters*, which include not only actual evictions or turnings out of possession, but also every wrongful withholding of possession; 2dly. *Injuries to the possession by trespasses or incumbrances upon the land*, and which may be as well by *acts* done as by *omissions*, as by neglecting to remove tithe, &c.; or by *nuisances near to the same*, as the obstruction of ancient lights, not removing nuisances, and not repairing fences. The latter include all the above injuries, when they are of such a nature as to affect the *future right of enjoyment*, whether in remainder or reversion, and also include waste and breaches of covenant affecting the future enjoyment of the property.

The *civil* injuries affecting real property *incorporeal* are principally by *disturbances*, as injuries to rights of common of pasture, or common of fishery, or ways, or watercourses, or rights to tithes, or advowson, or franchise, &c., or by *subtraction*, as withholding rents or services, &c. For most of these injuries there are three descriptions of remedies, viz. the *preventive*, the *compensatory*, or those for some degree of *punishment*, where the injury has been wilful and malicious.

FIRST. OUSTERS, and remedies for the same. (r)

Ouster defined. (r)

First. OUSTERS are either by actually *turning out*, or by *keeping excluded*, the party entitled to possession of any *real property corporeal*. An ouster can properly be only from *real property corporeal*, and it cannot be committed of anything moveable, (s) nor is a mere temporary trespass considered an ouster. (t) However, turning or keeping off cattle, or any other

(r) *Ouster* is the technical term still used in the declaration and action of ejectment, to describe an eviction or turning out of a farm or chattel interest, as a term for years in real property. *Disclaimer*, by a tenant's refusing to pay, or otherwise absolutely denying his landlord's title, is also equivalent to an ouster, 2 Schol. & Lefroy, 624, 625, ante, 237. *Disseisin* is the technical description of an eviction by a stranger from the *freehold*, and an ouster of the rightful tenant of the *freehold* from the possession, and an usurpation of the *freehold tenure*, 12 East, 141 *Doe v. Hull*, 2 Dowl. & R. 38, 604; *Jerritt v. Weare*, 3 Price's R. 575; but a lease by a stranger, and entry by the lessee, is not a disseisin *in fact*, without an entry by force, or an avowed intention to disseise, *Jerritt v. Weare*, 3 Price's R. 575; *Doe v. Hull*, 2 Dowl. & R. 38; and *Discontinuance* describes the eviction of a tenant in tail,

Doe dem. Jones v. Jones, 1 Bar. & Cres. 238; 2 Dowl. & R. 372, S.C.; *Burton v. Hussey*, 1 Hen. Bla. 269; *Doe v. Hordc*, Cowp 702. *Descent Cast*, is where the death of the party, who made the disseisin and descent of the estate of his heir, takes away the right of entry of the true owner and compels him to resort to a real action. It is scarcely possible now to suggest a case in which the doctrine of *descent cast* can be so applied as to prevent a claimant from maintaining an action of ejectment, 2 Dowl. & R. 41; *Adams's Ej. C. ed.* 41, note (e); 2 Bla. Com. 176, note 10; and see further 3 Tho. Co. Lit. 1.

(s) *Doe v. Cowley*, 1 Car. & P. 123; ante, 148 note (r). Ejectment for the *tithe* of a parish is an exception by 32 Hen. 8, c. 7, ante, 218.

(t) *Ante*, 374, note (s); 7 Term Rep. 327; 1 Bos. & P. 573.

continuing act of exclusion from the enjoyment, constitutes an ouster, even by one tenant in common of his co-tenant; (*u*) and although, in general, as each tenant in common has a right to enjoy the whole and every part of the joint property, the possession of one is deemed the possession of the other, so as not to constitute an ouster, or enable one to recover in ejectment against the other, and he must therefore, in an action of ejectment, prove some act equivalent to an *actual* eviction; (*v*) yet if one has for many years (as 35 years) exclusively received the *whole* rents, or had *exclusive possession* without accounting to his companion, a jury may presume an actual ouster. (*y*)

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There appear to be no less than *twelve remedies* for wrongful ousters or withholding possession of real property. Although the usual remedy for an ouster is an action of *ejectment*, yet it is clearly established that the party injured may not only *prevent* the completion of the act by *resisting* the attempt to evict, and this even by forcible means, (*z*) (provided a dangerous weapon be not used, (*a*)) but after he has been turned out he may legally at any time retake and keep possession of land, or even of a messuage, provided he can do so by stratagem or even by force, (not amounting to a forcible entry, nor occasioning a breach of the peace, (*b*)) and therefore many actions of ejectment are unnecessarily resorted to when without personal conflict possession might have been regained. (*c*) But the safer course may in many cases be to proceed by action of ejectment, a judgment in which would tend to establish the title and probably prevent future interruption. In the meantime, supposing that reasonable ground for apprehending waste or other material injury will be committed before any execution in ejectment can be obtained, then a Court of Equity will in some cases *immediately* interfere, and prevent such injury by injunction. (*d*) In cases of *forcible entries* and *ousters* and

1. Remedy by resistance.

2. Remedy by re-entry.

3. Remedy speedily by injunction in Court of Equity.

(*u*) Co. Lit. 199, b, 200. a, where see several instances of ouster.

(*v*) Id. *ibid*; 7 Mod. 39; *ante*, 271. But if the *consent* rule be general instead of special (avoiding any admission of an ouster as it should be) then the production of the *consent* rule will avoid the necessity of proof of actual eviction, *Doe v. Cuff*, 1 Camp. 173, *ante* 271.

(*y*) *Doe v. Prosser*, 1 Cowp. 217; 13 East, 212; but proof that one tenant levied a fine and received the whole rent for nearly *five years* is not (against the justice of the case) sufficient to find an ouster at the time the fine was levied, *Peaceable v. Read*, 1 East's Rep. 568.

(*z*) 1 East's P. C. 271, 277, 287; 7 Bing. 305; Skin. 387.

(*a*) Id. *ibid*.; 1 Hale's P. C. 445; *Cook's Case*, Cro. Car. 537; and see *post*, ch. vii.

(*b*) Because obtaining possession by such violent means would be indictable, 7 T. R. 432; 8 T. R. 357.

(*c*) *Turner v. Meymott*, 1 Bing. 158; 7 Moore, 574, S. C.; *Wildbore v. Rainforth*, 8 B. & Cres. 4; 3 Bing. 11, *post*, ch. vii.

(*d*) See the proceedings in the case *Ex parte Clegg*, MS., *post*, ch. viii. In that case, where a party wrongfully withholding possession had committed waste

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4. Remedy by justices giving possession in case of forcible entry.

5. Remedy summarily by justices giving possession where half-year's rent in arrear, and no distress, and premises deserted or uncultivated.

6. Remedy, double value for holding over after landlord's notice.

forcible detainers, justices of the peace also have the power of immediately restoring possession,^(e) but they are reluctant to act, and rarely can be persuaded to do so, though they might in a clear case be compelled to proceed by *mandamus* from the Court of King's Bench.^(f)

As between *landlord* and *tenant*, when the latter owes *half-a-year's rent*, and holds under any demise or agreement, whether written or verbal, (although there be not any power of re-entry reserved,) has deserted the premises and left the same uncultivated or unoccupied, so as no sufficient distress can be had to countervail the arrear of rent, two justices of the peace are, at the request of the landlord, to go to the premises and affix a notice on the premises of the day they will return, allowing at least fourteen days, and if upon such return the tenant do not pay the arrear, or there shall not be sufficient distress, then the justices are to put the landlord in possession, and the tenancy is thenceforth to cease.^(g)

In favour of *landlords*, if a *tenant* for life or *years*, or person holding under him, shall *wilfully* hold over after the expiration of a notice in *writing*, given by the landlord, and after *demand* of possession, the 4 Geo. 2, c. 28, as a compensation for such ouster or withholding possession, subjects the tenant to pay *double the yearly value for so long a time* as the same are detained.^(h) A weekly tenant is not within the act;⁽ⁱ⁾ and as the term "*wilfully*" has been adopted, it has been considered that a person holding over after the death of a tenant for life, upon a *bonâ fide* supposition that a lease granted by him continued valid, when in the result it was void, was not liable to the penalty of double value.^(k) The *landlord's* notice must have been in *writing*,^(l) and it must have been a valid notice, or at least accepted as valid by the tenant.^(m) A *demand* of posses-

by injuring a private railway and digging mines, and threatened further injury, an injunction was obtained *ex parte* in a very few days after the inception of the injury. The application and extension of the relief afforded in that case would, in practice, be of the greatest advantage to landlords and owners of property.

(e) *Post*, 377, 378; see fully *post*, ch. x.

(f) *Post*, ch. x.

(g) 11 Geo. 2, c. 19, s. 16; 57 Geo. 3, c. 52; and see 1 B. & Ald. 369; 3 B.

& Cres. 649, 5 Dowl. & R. 558, S. C.; Burn's J. tit. Distress, XVII.; and Chit. Col. Stat. tit. Landlord and Tenant, 673, 677, 678.

(h) 4 Geo. 2, c. 28, s. 1; Chit. Col. Stat. and notes, 606.

(i) *Lloyd v. Rosher*, 2 Camp. 453; but see Co. Lit. 54, b.; ante, 256.

(k) *Wright v. Smith*, 5 Esp. Rep. 203; and see *Soulshy v. Irving*, 9 East, 313.

(l) *Trimmins v. Rawlinson*, 3 Burr. 1607.

(m) *Johnson v. Huddleston*, 4 Bar. & Cres. 922; 7 Dowl. & R. 411.

sion is essential, but it has been held that it may be made even before the right of possession accrued, and even that the service of the written notice to quit will of itself constitute a sufficient demand, ⁽ⁿ⁾ and if made even six weeks *after* the expiration of the tenancy it suffices, unless there has been a binding assent of the landlord to the continuing in possession. ^(o) The statute gives an action of *debt*, and as double *value* is recoverable, the amount of which is uncertain till fixed by a jury, the landlord cannot *distrain*. ^(p)

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A subsequent act provides that if a *tenant* give a *notice to quit* and do not quit accordingly, he shall thenceforth pay *double rent*, to be levied, sued for, and recovered at the same times and in the same manner as the single rent, and such double rent shall *continue* to be paid during all the time that such tenant shall *continue in possession*. ^(q) But the holding over does not strictly *continue* the former or constitute a *new* tenancy, and therefore it has been held that if a *tenant*, after having given notice to quit, hold over for a year, paying double rent, he may quit at the end of such year without fresh notice, and is liable to pay double rent only whilst he withholds the possession. ^(r) The statute only applies when the tenant has the power of determining his tenancy by a notice, and has given a *valid* notice, or at least when the landlord has assented to accept an insufficient notice. ^(s) But the penalty being double *rent* it may be distrained for the same as single rent. ^(t)

7. Remedy,
double rent for
holding over
after tenant's
notice.

The statutes against *forcible entries and detainer*s, just alluded to, besides giving the power to justices immediately to restore possession and inflicting criminal punishments upon the offenders, also give a civil remedy to the party evicted; when a *freeholder*, by *action* of trespass for *treble* damages and treble costs; ^(u) and the proceedings upon an *indictment* upon the statute for a forcible entry operates as a civil remedy, for a part of the judgment

8. Remedy,
restitution, on
indictment for
forcible entry,
&c.

⁽ⁿ⁾ *Cutting v. Derby*, 2 Bla. Rep. 1075; *Wilkinson v. Colley*, 5 Burr. 2694; *Lake v. Smith*, 1 New Rep. 174. *Sed quære*, whether the legislature did not intend to require a demand after the expiration of the tenancy.

^(o) *Cobb v. Storckes*, 8 East, 358.

^(p) *Trimmins v. Rawlinson*, 3 Burr. R. 1605.

^(q) 11 Geo. 2, c. 19, s. 18; Chit. Col. Stat. & notes, 674.

^(r) *Booth v. Macfarlane*, 1 Bar. &

Adolp. 904.

^(s) *Johnson v. Huddleston*, 4 B. & Cres. 922; 7 Dowl. & R. 411, S. C.

* ^(t) *Trimmins v. Rawlinson*, 3 Burr. 1603.

^(u) 8 Hen. 6, c. 9; Co. Ent. 46, n. (a); 2 Chit. Pl. 5th ed. 864, 865. Only to a *freeholder* who has been forcibly expelled, 3 Bar. & Cres. 409; as to treble costs, 2 Inst. 289; 10 Co. 115, b.; 1 Vent. 22; but see as to treble costs, Hard. 152; ante, 27, 28.

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PROPERTY.

is an award of and writ of restitution, unless the offender has been in possession more than three years, (x) for which reason a party interested in the possession of the estate is not a competent witness in support of the prosecution. (y) The statute 21 Jac. 1, c. 15, extends the writ of restitution to tenants for years and copyholders, and tenants by *elegit* ousted by the lessor or the lord or others. (z)

9. Remedy,
justices giving
summary pos-
session where
paupers retain
possession.

When a *pauper** or others have been permitted to occupy, or has intruded himself into a house, tenement, or dwelling, or land appropriated for the poor belonging to a parish, shall refuse or neglect to quit the same to the churchwardens and overseers of the poor within one month after notice and demand in writing, two justices of the peace may summon the party, and after the expiration of seven days they may by warrant cause possession to be delivered to the parish officers; (a) but this proceeding is cumulative, and where a party wrongfully withholds possession, the latter may be taken without force, or the proceeding may be by action of ejectment. (b)

10. Remedies
in equity.

When the *legal* estate is vested in a trustee and he declines to interfere and allow his name to be used in the supposed demise in a declaration of ejectment, then (although he could not in case an action should be brought on his demise defeat the action by release, (c)) it is advisable to state explicitly in writing the necessity for the proceeding in an action of ejectment, and to tender an adequate indemnity, (d) and in case the trustee should wrongfully persist in his refusal and impede the proceedings, the *cestui que trust* might proceed in his name or file a bill in a Court of Equity, and probably the trustee might under circumstances be subjected to costs in a clear breach of trust; (e) or it may become necessary to file a bill and move for an injunction against a tenant holding over, (f) or to restrain a defendant in ejectment from setting up an outstanding term; (g)

(x) 8 Hen. 6, c. 9; 31 Eliz. c. 11; 21 Jac. 1, c. 15. See statutes and cases, Burn's J. Forcible Entry and Detainer; and *post*, ch. x.

(y) *Rex v. Williams*, 9 Bar. & Cres. 549; Talf. Dick. Sess. 239, S. C.; *Rex v. Bevan*, Ry. & M. N. P. C. 242.

(z) See Burn's J. Forcible Entry, I. A lord of a manor may be indicted for a forcible entry on his copyholder, see Gilb. Ten. 328; 3 Burr. R. 1733; 1 Tho. Co. Lit. 657, n. C.

(a) 59 Geo. 3, c. 12, s. 17, 24, 25; see

Chit. Col. Stat. 679, 680, and notes; *Woodcock v. Gibson*, 4 B. & Cres. 524; 6 Dowl. & R. 521, S. C.; as to the summons, &c. see 1 Bing. 537; 8 T. R. 109.

(b) *Wildbore v. Rainforth*, 8 B. & Cres. 4; *Turner v. Meymott*, 1 Bing. 153; 7 Moore, 574, S. C.; *ante*, 375.

(c) 4 Maule & Sel. 300.

(d) See the mode of tender, *post*, ch. vi.

(e) 3 Maule & Sel. 516; 6 Bing. 174.

(f) Chit. Eq. Dig. 1057; 15 Ves. 180; 5 Price, 468.

(g) Chit. Eq. Dig. 1055.

or a bill to quiet the owner in possession, after repeated trials at law, may become a prudent proceeding to prevent future litigation. (h)

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II. & III. INJURIES TO REAL
PROPERTY.

The ordinary proceeding for recovery of the *possession* of premises, where the *right* of possession has accrued within twenty years, (after which it is necessary in general to proceed in a *Real* action,) is by ejectment, which is a *mixed* action, as well for recovery of possession as for *damages*, and though until recently the latter were merely nominal, and the defendant could not be compelled to give security in the nature of bail, yet the recent acts, (1 Geo. 4, c. 87, and 1 Wm. 4, c. 70, s. 36 to 38, and 1 Wm. 4, sess. 1. c. 7,) in cases between landlord and tenant, restore the action to the ancient principle, and entitle the lessor of the plaintiff not only to recover possession, but also actual *damages*, in the nature of mesne or intermediate profits, whilst the party has wrongfully withheld possession, and so as to prevent the necessity for a subsequent *distinct* action of *trespass* to recover such mesne profits. But these statutes are confined to proceedings by *landlords* against *tenants* holding over, and do not extend to other claimants.

11. Remedy
by action of
ejectment in
general.

The whole practice in ejectment will be considered in the second volume, (i) and we shall merely here observe that an action of ejectment can only be sustained when the property to be recovered is *real* property, and actually part thereof, and not for a thing moveable, or for or against a person in respect of a stall set up in a street, and not substantially and permanently let into the ground, (k) nor for a mere *transient trespass*, where there is no *continued* ouster or exclusion from house or land, an action of *trespass quare clausum fregit* being then the proper remedy for such mere trespass. (l) So ejectment is not sustainable for *Dower* before it has been assigned, as the widow has not before that division any distinct legal interest in any part of the land. (m) Nor can ejectment be sustained for *Incorporeal* property, which not being tangible is incapable of being injured by an ouster, and the proper remedy is case for the injury. But ejectment for *Tithes* is an exception introduced by statute; (n) and ejectment, we have seen, lies for a right of

(h) *Post*, ch. viii.

(i) And see Adams on Ejectment, 3 ed., one of the very best modern works, replete with learning, and equally perspicuous and practically useful.

(k) *Doe v. Cowley*, 1 Car. & P. 123,

and *ante*, 148, note (r), 374, 375.

(l) *Id. ibid.*; 7 T. R. 327; 1 Bos. & Pnl. 573, *ante*, 374, 375.

(m) 2 Car. & P. 430.

(n) 32 Hen. 8, c. 7, s. 7; Cro. Car. 301; *ante*, 213.

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common appendant or appurtenant, when claimed together with real property. (o) With respect to the *Title*, it should seem that the modern practice narrows the maxim, that the lessor of the plaintiff must recover upon the strength of his own title, and not on the weakness of that of his adversary, for (at least *prima facie*) mere proof of *priority of possession* will suffice against a party who acquired possession from or under the lessor of the plaintiff by consent or force or fraud. (p)

12. Remedy
for Dower.

A widow has not, until a distinct third has been assigned to her by consent, or under process of law, any legal interest in any part of the land, and (subject to her right to retain possession of the principal mansion for forty days after her husband's death,) she would have no defence to an action of ejectment on the demise of the heir. She should therefore require the heir to assign her a just proportion of the estate descended, and if he should afterwards refuse, a Court of Equity would probably compel him to pay costs. If the husband died seised, then, upon a writ of dower, she would at law be entitled to *damages* and costs; but if he did not die seised, then she could not at law recover either, and therefore in that case it is better, after demand, to proceed in a Court of Equity. (q)

SECONDLY.
TRESPASSES
and remedies.
What a trespass.

SECONDLY, are injuries by *trespasses upon* land or in the house of a party in *actual possession* and without eviction. The act complained of must have been *upon* or at least in *contact* with the land or building, or it cannot be deemed a trespass, but merely a nuisance, remediable in an action on the case, (r) and must have been an act *committed* by, or caused to have been committed by the defendant; and therefore although the owner of cattle, whose habit of wandering must be known, or presumed to have been *known* to him, is liable to be sued for trespasses committed by them, although without his actual concurrence, it would be otherwise as respects other animals, as a dog; (s) but a very small contact, such as earth being piled up near to and rolling *against* a wall, though upon the land of the wrong-doer. (t) It must be some *act done*, so that it might be technically described as committed with *force*, and therefore a *mere nonfeasance*, such as the neglect to remove

(o) 1 Stra. 54; ante, 211, note (c).

(p) Ante, 274, 275.

(q) 2 Saund. R. 43, in notes; Mit. Eq. Treat. 111; Bac. Ab. Dower; Chit. Eq. Dig. 324 to 328; and 3 Chit. Pl. 5 ed. 1311 to 1330.

(r) 2 Burr. 1114; 11 Mod. 74, 130; 1 Stark. R. 59.

(s) 1 Car. & P. 119; Burr. Rep. 2092; 2 Lev. 172; 1 Chit. Pl. 5 ed. 94, 95.

(t) 9 B. & Cres. 591.

tithe duly severed is not a trespass; (*u*) and it should seem questionable whether the *mere continuance* of an injury, for the inception of which the plaintiff has already recovered damages, can be treated as a trespass, as the neglect to remove an incumbrance on land after a verdict for placing the same thereon. (*x*) The injury must also be to the *possession*, and a person who has not had actual possession, but merely the right, cannot, before he has taken possession, sue, though afterwards he might for an antecedent injury, after his right first accrued. (*y*) But we have seen that mere possession, and that even under a void lease, is sufficient against a wrong-doer or person who cannot prove the right of possession in himself, or in some person by whose authority he committed the act complained of. (*z*)

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1. The remedies for trespasses are by *prevention*, *compensation*, or *punishment*. The *prevention*, by turning off the trespasser or his cattle, not using unnecessary force or dangerous weapon, (*a*) but not by placing dangerous instruments on the land, as spring guns, (*b*) or dog spears, (*c*) or a ferocious dog or other animal in an open yard, at least without adequate notice. (*d*) So the continuance of a trespass by cattle may be prevented, and the payment of damages for the injury then doing may be secured by *distraint* the cattle whilst in the act of doing the damage, and upon the same close, but not after they have escaped. (*e*) So in case of wasteful continued trespasses, it may be expedient to *file a bill*, and by injunction prevent a repetition. (*f*)

1. Remedies by preventions, &c.

2. Remedy by distress.

3. Remedy by proceeding in equity.

4. And compensation to the extent of 5*l.* for small wilful or malicious trespasses, occasioning actual damage, and not mere trespasses by walking over land, may be obtained by summary proceeding before a justice. (*g*)

4. Remedy by summary proceeding before a justice.

5. To prevent trespasses in pursuit of game, summary proceedings are provided either to apprehend and detain for even

5. Remedies for trespasses as to game.

(*u*) 1 Bos. & Pul. 476; 1 Ld. Raym. 188.

(*x*) 1 Stark. R. 22.

(*y*) See cases 1 Chit. Pl. 5 ed. 204.

(*z*) 1 East, 244; 11 East, 65.

(*a*) 2 Salk. 641; 7 Bing. 316; *post*, chap. vii.

(*b*) 7 & 8 Geo. 4, c. 18, s. 1; 4 Bing. 633; *post*, chap. vii.

(*c*) 1 J. B. Moore, 202; 4 Bing. 642, 643; *post*, chap. vii.

(*d*) *Sorel v. Blackburn*, 4 Car. & P. 297; *M'Kone v. Wood*, 5 Car. & P. 1; 3 B. & Ald. 312, 313; see fully chap. vii.

(*e*) 4 Bing. 642, 643; *post*, chap. vii.

(*f*) *Ex parte Clegg*, *post*, chap. viii.; 17 Ves. 110; 1 Swans. 208; 5 Mad. 45; Chit. Eq. Dig. 1058.

(*g*) 7 & 8 Geo. 4, c. 30, s. 24; *Buller v. Turley*, 2 Car. & P. 585; *Devey v. White*, 1 Mood. & M. 56; *Rex v. Harper*, 1 Dowl. & R. 223; *post*, Criminal Injuries.

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twelve hours, a trespasser who refuses truly to tell his name and place of abode, and to take him before a justice; and such justice may convict in penalties for trespassing, taking game, attempting to poison it, and other injuries. (*h*)

6. Remedy by
action of tres-
pass

6. But the common law action of trespass is the usual remedy for trespasses and other *immediate* injuries on land or buildings, but restrained by statutes, enacting that the plaintiff, whenever he recovers a verdict for less than 40s. shall have no more costs than the damages, unless the judge certify that the trespass was wilful, or that the freehold came in question; and hence the expediency of not proceeding for any trespass, unless it were committed after notice not to commit it, or unless the damages were so considerable as to render it certain that the verdict will be for 40s. or upwards. (*i*)

7. Remedies
for nonfeasance,
&c.

7. We have seen that mere *omissions* are not trespasses, nor remediable by action of trespass. Such as the *neglect to remove* tithe, (*j*) or to remove an incumbrance after recovery of damages for the original trespass; and in these cases the remedies are by carefully removing the incumbrance to a proper place off the land, or after requesting the wrong-doer to remove the nuisance, by proceeding in an action against him for his neglecting to do so; and it would not be legal to turn cattle upon the land, or otherwise to damage the tithe, (*k*) and care must be observed in the removal of the property incumbering the soil. (*l*) The incumbrance might however be distrained damage feasant. (*l*)

THIRDLY. In-
juries by not
repairing
FENCES.

THIRDLY. DEFECT OF FENCES. We have considered in whom the property in a hedge, ditch or fence is usually vested, and the legal obligation to repair the same. (*m*) The neglect to repair is an injury which may be compensated, 1st. by the occupier of the adjacent close distraining damage feasant cattle that escaped, through the insufficiency of the fence, into the land of such occupier; (*n*) or 2dly, his suing the wrong-doer for the trespass committed by his cattle; (*o*) 3dly, if the cattle of the adjacent occupier escape, and he thereby sustain

(*h*) 1 & 2 W. 4. c. 32, *post*, Crim. Inj.
(*i*) 22 & 23 Car. 2, c. 9; 4 & 5 W. & M. c. 23, s. 10; 8 & 9 W. 3, c. 11, s. 4; Tidd, 9 ed. 963 to 968; *ante*, 23, 27, and *post*, chap. v. as to notices not to trespass.
(*j*) Ld. Raym. 187, 1399; 1 Stra. 634.

(*k*) 8 T. R. 72.
(*l*) *Post*, chap. v.
(*m*) *Ante*, 193 to 197; Vin. Ab. Fences, and 2 Chit. Pl. 5 ed. 780, notes.
(*n*) 1 Salk. 335.
(*o*) Id. *ibid.*; Bull. N. P. 74.

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loss or trouble in recovering them, then he may support an action on the case for the consequence of the neglect to repair; (p) 4thly, the party who ought to have repaired could not sue for trespass committed in consequence of the defect in his fences. (q) 5thly. Perhaps between freeholders, the ancient proceeding to compel reparation by writ *curia claudenda* might be advantageously revived. (r) In an action on the case for not repairing, it suffices to allege generally that the defendant "*debit reparare*," without showing the origin or consideration for the supposed liability, and this seems sufficient, although it should appear that the obligation originated by express agreement. (s)

FOURTHLY. Injuries by NUISANCES and other injurious acts, the cause of which is *near* to the house or land of the party complaining, but not *upon* the same, are the consequence of some wrongful act or omission of a party, who either ought not to have occasioned or permitted the same, or who ought to remove the same. Such as injuries to the light or air, occasioned by improper obstruction of ancient windows; or arising from not cleansing cesspools, watercourse, &c.; or by frightening wild fowl from a decoy by noises near the same; or by causing water to flow, or preventing it from flowing, to a party's estate.

FOURTHLY.
NUISANCES not
upon, but near
the complain-
ant's house or
land, and reme-
dies.

1. For these injuries also the remedies are *prevention*, *compensation*, or *punishment*. *Prevention*, by entering the land of the wrong-doer, and carefully abating or removing the nuisance; (t) but previous to which, at least where the injury is a mere continuance or omission, there should in general be a request to the wrong-doer himself to remove the matter complained of; (u) or the nuisance by building or otherwise may be prevented by *Injunction*. (x)

1. Remedies,
prevention and
removal.

2. The remedy by action to recover damages for most nuisances and injuries committed *off* the land of the party com-

2. Remedies by
action.

(p) 2 Y. & Jer. 391; 1 B. & Ald. 59.

(q) *Ante*, 194.

(r) *Ante*, 195, note (m).

(s) 3 T. R. 766; 1 Price's R. 27; 6 B. & Cres. 333, 338; 2 Saund. 114, n., b., c.

(t) *Raikes v. Townson*, 2 Smith's R. 9; 2 Salk. 459; *Earl Lonsdale v. Nelson*, 2 B. & Cres. 302; 3 Dowl. & R. 556; *post*,

chap. vii. as to the *abatement* of nuisances.

(u) *Earl Lonsdale v. Nelson*, 2 B. & Cres. 302; 3 Dowl. & R. 556; *post*, chap. vii.

(x) 2 Russ. R. 121; 2 Swans. 333; 16 Ves. 338; against powder mills, 19 Ves. 617; 18 Ves. 211; Chit. Eq. Dig. 1053, 1055; *post*, chap. viii.

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plaining is generally *case*, and in which the plaintiff is entitled to full costs however small the damages, unless the judge should certify to take them away, as he may do in all actions. (y) And if the nuisance be *continued*, successive actions may be brought, even by a reversioner, until at length the wrong-doer has been induced to remove the nuisance complained of. (a) But before the commencement of an action against a mere continuer of a nuisance, who did not himself erect it, he should be requested to remove it, and such request should be averred and proved. (b) When the nuisance was first occasioned within six years, the action may be against the party who erected it, (c) though the safest course is to request a removal, and afterwards to sue the occupier, whose duty resulting from his occupation is to remove every illegal nuisance on his land occasioning injury to the property of any adjacent owner. (d) We have considered the right to *ancient lights* in general. (e) If ancient windows be raised and enlarged, the owner of the adjoining land cannot legally obstruct the passage of the light or air to any part of the space occupied by the ancient window. (f) And it is not necessary to prove a total privation of light or air to sustain an action, for if the party cannot enjoy the light in so free and ample a manner as he did before, he may sustain the action, though there must be proof of some *sensible diminution* of light or air. (g) The building a wall which merely obstructs a prospect is not actionable, (h) nor is the opening a window and destroying the privacy of the adjoining property actionable, but such new window may be immediately obstructed, so as to prevent a right to its being acquired by twenty years' use. (i)

(y) 2 Burr. R. 1114; 1 Chit. Pl. 5 ed. 159, 160; 2 Bla. C. 403, n. 6; 3 Bla. C. 216; *ante*, 380, n. (r).

(a) *Ante*, 267; 2 B. & Adolp. 97.

(b) Willes's Rep. 583; Cro. Jac. 555; 5 Co. 100, 101; Jenk. 260. But it has been held, that proof of a notice to remove having been left at the premises, is evidence against a subsequent occupier, to render him liable to be sued for the continuance, 1 Ry. & M. C. N. P. 189.

(c) Com. Dig. Action for Nuisance, 13; 1 Bos. & Pul. 404. It may be against lessor, if nuisance was erected by him, 2 Salk. 460; 12 Mod. 636; or even an agent who erected, 6 Moore, 47.

(d) 4 T. R. 318; 2 Hen. Bla. 350.

(e) *Ante*, 206, to 208, 282 to 286.

(f) 3 Campb. 80; *ante*, 157, 208.

(g) 4 Esp. R. 69; 2 Car. & P. 465; *Chilton v. Sir T. Plumer*, Sittings at Westminster, in the King's Bench, A.D. 1822.

(h) 9 Coke, 58, l.; 1 Mod. 55; 2 Selw. N. P. 4 ed. 1046.

(i) 3 Campb. 82. In obstructing such new window, care must be observed not to trespass upon or against the land or building of the person who made the window, but it should be effected by placing a board upon a pole opposite the window, and in the ground of the party annoyed by such window.

3. The judgment *quod prostravit*, upon an indictment for a continuing nuisance, might, in that respect, operate as a private preventive remedy.

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Some of the preceding injuries may so *continue in their consequences* as to be prejudicial to an interest in real property in *remainder* or *reversion*, and entitle the parties having such interests to sue for such consequences. (*k*) Thus we have seen that if a *trespass* or direct injury to the *possession* occasion such *continuing damages* as to affect and prejudice also the *reversionary* interest, the occupier may sue in trespass for the injury to his possession, and the reversioner may also sue in case for the injury to his right. (*k*) So, if a nuisance committed *near* to buildings or land occasion as well a present injury to the possession as also an injury to the remainder or reversion, the occupier may sue in case, and the remainder-man or reversioner may also sue in case; so it should seem that a reversioner might sue for stopping up a way. (*l*) And it is immaterial of what tenure the land may be, and any future vested interest that has been injured is in general sufficient; thus a remainder-man of copyhold premises may sue; (*m*) and a remainder-man may sue a tenant for life for any wrongful act that has prejudiced his interest. (*n*) But in all these cases the form of the remedy at the suit of a reversioner or a remainder-man differs from that of the occupier, for it must be expressly in *case*, stating the injury, not to the possession, but to the reversionary interest, and it must show and aver an injury *capable* of extending and continuing so as to affect the future right of possession, and that it *actually did injure* the reversionary interest; (*o*) though the declaration need not show the precise extent or nature of the interest in remainder or reversion, and a general allegation that at the time of committing the grievance complained of, the premises upon or to which the injury was committed was in the possession of a certain person, to wit, *E. F.*, as tenant thereof to the plaintiff, the *reversion* (or "*remainder*,"") thereof then (*p*) belonging to the plaintiff, is sufficient, and preferable to a more precise allegation; (*q*) but in evidence, the lease

3. Remedy by prostration on indictment.

Fifthly. Injuries to rights in remainder and reversion, and of landlords and successors, &c.

(*k*) *Ante*, 266 to 268; 4 Burr. 2141; 3 Car. & P. 817.

(*l*) 8 Wentw. 550; *quare*, Com. Dig. Action on Case; Nuisance, B; 3 Lev. 360.

(*m*) *Jefferson v. Jefferson*, 3 Lev. 130; *Jesser v. Gifford*, 4 Burr. 2141; *Fisher on Copyhold*, 114; 2 Saund. R. 252, a. note 7.

(*n*) *Semble*, 2 Saund. 252, a., but those were cases of waste.

(*o*) 1 M. & S. 234, 239; *ante*, 267, note (*a*); 1 B. & Adolph. 391.

(*p*) It is not necessary, though usual, to aver that the plaintiff's interest *still* continues, 3 Taunt. 137.

(*q*) Com. Dig. Pleader, C. 39. Sometimes a seisin in fee of the reversion is unnecessarily stated, 3 Wils. 461; 8 Wentw. 550.

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WASTE and other injuries to a remainderman or reversioner.

or agreement which creates and limits the possessory interest should be proved. (r)

But the principal injuries affecting remainders and reversions are those committed *upon* or *to* the buildings or land during a tenancy for *life* or *years*, and which may be *Waste* or *Breach of Covenant* or *stipulation* expressed or implied. *Waste* is the principal injury, and may be either *active* and *wilful*, usually termed *voluntary waste*, or it may be *permissive*: the *former*, by pulling down houses, destroying heir-looms, opening new mines or pits, changing the course of husbandry, felling timber trees, or by any material alteration in the state of the premises, even by an enlargement, melioration,* or improvement in value of the premises; (s) and the *latter* by *permitting* or suffering premises to become or continue dilapidated for want of requisite repairs. The extent of liability for mere *permissive* waste appears to be questionable, and therefore in creating tenancies for life or years, it is at least advisable to specify the duty by express stipulation or *covenant*.

Tenants for life.
(t)

Tenants for *life*, unless expressly punishable for waste, are liable to any *actual* or *wilful* waste, as cutting trees otherwise than for repairs, (u) or altering buildings or land, or destroying hedge-rows; and even if punishable of waste, we have seen that a Court of Equity will by injunction prevent equitable or malicious waste, as cutting ornamental timber, or pulling down a mansion, excepting for rebuilding, when necessary. (x) The statute of Marlebridge, 52 Hen. 3, c. 23, and the statute of Gloucester, 6 Ed. 1, c. 5, are the only statutes relating to waste. The first enacts, sect. 2, "also fermors, during their terms, shall not make waste, sale, nor exile of house, woods, and men, nor of any thing belonging to the tenements that they have to ferm, without special license had by writing of covenant, making mention that they may do it; which thing, if they do, and thereof be convict, they shall yield full damage, and shall be *punished by amerciament grievously*." The statute of Gloucester, 6 Ed. 1, c. 5, enacts, "that a man shall have a writ of waste in the Chancery against him that holdeth by law of England (*i. e.* tenant by curtesy) or otherwise, *for term of life*, or *for term of years*, or a woman in dower; and he which shall be attainted of *waste* shall leese the thing that *he hath*

(r) 4 Bar. & Cres, 465; *Semble*, a mortgagor may be treated as tenant to mortgagee, 5 B. & Ald. 604.

(s) *Greene v. Cole*, 1 Lev. 309; 2 Saund. 259; and see other cases, *Id. n.* 11; *Cole v. Forth*, 1 Mod. 94. See cases,

3 Tho. Co. Lit. 233; *Keepers of Harrow School v. Alderton*, 2 Bos. & Pul. 86; *Simmons v. Norton*, 7 Bing. R. 640.

(t) See in general, *ante*, 259, 260.

(u) *Ante*, 260.

(x) *Id. ibid.*

wasted, and moreover shall recompence *thrice* so much as the waste shall be taxed at." It is submitted that both these acts only apply to *wilful* or *voluntary* waste, and do not extend to mere *permissive* waste. Mr. Serjeant Williams, in his valuable edition of Saunders, (y) *mistakes* this enactment, as if it *expressly* gave an action of waste or in case against any lessee for life or years, guilty of *permissive* waste, as if he *permit* an house to be out of repair, unless it was ruinous at the time of the lease; (z) (although that act speaks only of forfeiture of the thing that he *wasted* with treble damages; (a)) and he refers to elementary works, as proving that the statute extends to *permissive* as well as voluntary waste, and he insists that the statute extends to tenants from year to year, or *even half a year*; (b) but the subsequent editors, in their learned and accurate notes, have questioned the latter opinion, at least as regards tenants from year to year, and also as regards lessees for years under a lease not containing any covenant to repair. (c) And it seems questionable, whether the statute of Gloucester extends to any case of mere *permissive* waste, and, indeed, whether a tenant for life is liable to any penalty, forfeiture, or action for *merely neglecting to repair*, unless he be under express directions or agreement to do so. (d) And it will be observed that Blackstone, when he states the incidents of a tenancy for life, does not intimate any liability to repair or prevent *permissive* waste. (e)

It should seem however that such reparations as are absolutely *essential* to prevent the *total destruction* of the property must be made by a tenant for life, as the reparation of a sea wall, or, embankment of a river. (f) But this only refers to ordinary supports of such walls and embankments, and does not render such a tenant responsible for extraordinary tempests or floods, (f) nor for dilapidations occasioned by lightning, enemies, &c., (g) nor to reparations of buildings originally dilapidated at the time when their interest commenced. (h)

(y) 1 Saund. Rep. 323, b., n. 7; 2 Saund. 259, note 11.

(z) Id. *ibid.* cites Co. Lit. 54, b.

(a) *Sed quare*. Did the legislature intend to impose so heavy a penalty for *merely permitting* the progress of decay, or was not the intention only to prevent *wilful* waste? and see *Herne v. Benbow*, 4 Taunt. 764; *infra*, 389, n. (w).

(b) 1 Saund. 323, b. note 7, refers to 2 Inst. 145; Co. Lit. 53, a.; 2 Rol. Ab. 816; 2 Saund 259, n. 11.

(c) 1 Saund. 323, b. note (k); and 2 Saund. 252, a. note (b), and cases there cited.

(d) *Herne v. Benbow*, 4 Taunt. 764, *post*, 389, n. (w), which, though a case of a tenant for years is applicable; and see *Jones v. Hill*, 7 Taunt. 392; 1 J. B. Moore, 100, S. C.

(e) 2 Bla. C. 122; 3 Bla. C. 224; Co. Lit. 53; but in 2 Bla. Com. 283, it is certainly supposed that the statute extends to *permissive* waste.

(f) 3 Tho. Co. Lit. 236.

(g) 2 Saund. 238, note 5.

(h) Moore, 54; Winch. Ent. 1159; 2 Saund. 238, note 5; 259, note 11; Co. Lit. 53, a.; *Glover v. Pope*, Owen. 92.

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In case of lands of *Copyhold tenure*, if there be no custom to the contrary, waste, whether permissive or voluntary, is a forfeiture to the lord; (i) and the lord may enter for waste committed by a copyholder for life, though there be an intermediate estate in remainder between the estate for life and the lord's reversion. (k) But in such a case of forfeiture, especially by *permissive waste*, or waste by a tenant of the copyholder, a Court of Equity will relieve, and compel the lord to re-admit, on receiving satisfaction for the injury he has received. (l)

In the absence of express covenant, and where *wilful waste* has been committed by an occupier, an action on the *case* may be sustained against him by a party who has the *immediate* reversion or remainder for life or years, as well as in fee or in tail, and the plaintiff is entitled to costs; (m) though a *writ of waste* could only be supported by him who has the *immediate* reversion or remainder in *fee-simple* or in *fee-tail*, so that his *inheritance* was injured; and a mere remainder-man for *life* could not support that writ. (n) Nor would costs be recoverable if the single damages exceeded twenty nobles; (o) nor can any action at *law* be supported against an executor of a tenant for life for waste committed by his testator, it being a tort which dies with the person, (p) unless for the money received by a sale of the timber. (q) But a Court of Equity will, where a tenant for life has committed waste by cutting timber, afford compensation against his assets, after paying debts, and in preference to legacies. (r)

In declaring by an immediate remainder-man against a tenant for life for wilful waste, it is better not to state with particularity the precise nature of the plaintiff's interest in remainder or reversion, for fear of variance; (s) but it is necessary to state correctly the nature and kind of waste that has been committed. (t)

Tenant for a term of years, or under a lease.

Tenants for a term of years, like all other persons who have only a *temporary* interest, are liable for *wilful waste*, whether committed by themselves or a stranger. (u) With respect to

(i) Co. Lit. 63, a.; 1 Tho. Co. Lit. 673, 674, note 32, where the cases *contra* are stated.

(k) *Doe v. Clements*, 2 Maul. & Sel. 68.

(l) 4 Ves. 704, 705; 1 Ch. Cas. 95; Pre. Ch. 568; Toth. Cha. 257; Mo. 49; Co. Lit. 63, a., note 2; 1 Tho. Co. Lit. 674, note 33.

(m) 2 Saund. 252, note 7.

(n) Id. *ibid.*; 3 Tho. Co. Lit. 246, note Q.

(o) 8 & 9 Wm. 3, c. 11, s. 3.

(p) Id. *ibid.*; 2 Inst. 302; 2 Rol. Ab.

828, pl. 7; 3 Tho. Co. Lit. 246, note 2; 251, note B. 1.

(q) 3 Tho. Co. Lit. 251, B. 1; 244, note O.

(r) Tho. Co. Lit. 246, note 2, 251, note B. 1.

(s) 2 Saund. 252, b., note 7; *Hardwick v. Thompson*, A.D. 1799, there cited; Yelv. 141.

(t) 2 Saund. 252, c., note 7.

(u) 1 Taunt. 196, 201; 2 Saund. 259, b., note (f').

tenants for terms of years under *lease* or express demise, it has been holden, contrary to the former prevailing opinion, (v) that no action for *permissive waste* in buildings is sustainable against a tenant by lease who has not *covenanted* to repair. (w) So it has been decided that a tenant for years who has covenanted to repair and leave the premises in as good a condition as they were in when finished by one *J. M.*, is not liable to be sued generally for permissive waste. (x) That decision is correct, if the statute of Gloucester, which speaks of forfeitures for *waste done* by tenants for term of life or *years*, does not extend to *permissive waste*, or waste occasioned by accidental burning; but otherwise it is obviously incorrect. (y) In the case of land of *copyhold* tenure, we have seen that, if there be no custom to the contrary, waste, either *permissive* or voluntary, of a copyholder is a forfeiture of his copyhold, and this, although the waste be committed or permitted by a mere under-tenant; (z) and therefore a copyholder must take special care to keep his customary tenement in good repair.

Where there has been an express covenant or agreement to repair, the action should be upon the same, though it has been held that the landlord has the option of suing in case. (a) If a tenant neglect to repair according to contract, and the lessor himself be a lessee, and under pain of forfeiture, he may enter, without the sub-lessee's consent, and perform the repairs; (b) or if he be sued by the superior landlord on his covenant to repair, and his immediate tenant refuse to repair, or defend the action, the damages and costs recovered against him by the ground landlord and the costs of defence may form the measure of damages to be recovered in his subsequent action against his own tenant; (c) and though it is usual and advisable in such a case to give notice of the threatened action of the superior landlord, it is not absolutely necessary to give the same.

Every tenant from year to year is bound not to commit *voluntary waste*, such as ploughing up strawberry beds still in bearing, and this, although he paid for them at a valuation when

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(v) See Mr. Serjeant Williams's note, 1 Saund. 523, b., note 7; 2 Saund. 259, note 11.

(w) *Herne v. Benbow*, 4 Taunt. 764; 5 Coke, 13, b.; 2 Saund. R. 252, a., note 1. by Patteson and Williams, but there stated as *doubtful*; 1 Tho. Co. Lit. 644, note 19.

(x) *Jones v. Hill*, 7 Taunt. 392; 1 J. B. Moore, 100, S. C.

(y) See 1 Tho. Co. Lit. 644, note 19,

and cases there cited, where the statute of Gloucester is considered as extending to permissive waste.

(z) *Aute*, 388; 1 Tho. Co. Lit. 673, 674, note 32.

(a) 2 Bla. R. 1111; 2 Saund. 252, a. b., note 7.

(b) 2 B. & Cres. 273; 3 Dowl. & R. 522, S. C.

(c) 3 B. & Cres. 533; 5 Dowl. & R. 542, S. C.; and see 5 Bar. & Cres. 603,

Tenants from year to year, or for less than a year.

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he entered. (d) As to *permissive* waste, Mr. Serjeant Williams has stated that a tenant from year to year, or even for half a year, is, under the statute of Gloucester, liable for *permissive* waste, and consequently bound to repair; (e) but it would be unreasonable to require a person who has so short, precarious, and uncertain an interest, determinable at any time by a notice to quit, to incur the expense of repairs, for he merely hires, and impliedly engages to pay for the *temporary* use of the premises, and to use the premises in a proper manner; and as to reparations, it is more reasonable that the landlord, who has the permanent or larger interest, should make them, unless the dilapidation be occasioned by breakage or other want of care on the part of the occupier. And the modern decisions accord with this view of the tenant's liability; and he is not even bound to make or do what are termed tenant's repairs, or to keep the premises wind and water tight; and although in the absence of express stipulation he cannot compel the landlord to repair, (f) yet it has been held that when the premises have become uninhabitable, and the landlord refuses to repair, the tenant may quit without a regular notice to quit, and may resist the payment of any future rent; and the supposition that a tenant from year to year is liable to repair, has been refuted by the more recent learned editors of Saunders, (g) and by decisions which establish that a mere tenant from year to year, still less for half a year, is not bound to repair in the absence of a covenant or agreement to do so. (h) But which is *implied* when such a tenant holds over after a lease containing an express covenant to keep in repair, (i) and extends to all stipulations in such lease that can possibly be applicable to a tenancy from year to year. (k) And where a party takes possession under an agreement for a lease, he may be treated as impliedly agreeing to become tenant from year to year on the terms of the

(d) *Wetherell v. Howells*, 1 Campb. 227.

(e) 1 Saund. 323, b., note (7).

(f) *Id.* *ibid.*

(g) *Id.* *ibid.* note (k); 2 *Id.* 252, a., note (b).

(h) 5 Co. 13, b., Hale's MS.; *Gibson v. Wells*, 1 New Rep. 290; *Herne v. Benbow*, 4 Taunt. 764; 1 Marsh. 567; 6 Taunt. 300, S. C.; *Jones v. Hill*, 1 J. B. Moore, 100; 7 Taunt. 392; *Horsefall v. Mather*, Holt's C. N. P. 7; 1 Saund. 323, a., n. (i); 2 Saund. 252, a., n. (h), acc. But see Co. Lit. 57a., 7; 1 Saund. 323, b., n. (7). (by Mr. Serjt. Williams) it was supposed that a tenant from year

to year is bound to keep premises in *tenantable* repair, though not bound to make *substantial* and lasting or general repairs, such as putting a new roof on an old house, putting in a new main-beam, &c.; and see *id.* 2 Esp. Rep. 598; 2 Bla. Rep. 84; 2 Bar. & Cres. 278; 3 Dowl. & Ry. 522.

(i) 2 Bar. & Cres. 273; 3 Dowl. & R. 522, S. C.

(k) *Id.* *ibid.*; 6 Esp. Rep. 106; 11 East, 71; 3 Taunt. 410; 4 Campb. 275; 3 Bing. 363; 3 Bar. & Cres. 483; 5 Dowl. & R. 213, S. C.

agreement; (*l*) and he may also be sued for the breach of an implied contract to use the premises in a *tenantlike* manner, although the agreement for a lease stipulated that it should contain a covenant to repair. (*m*) Such a tenant from year to year impliedly engages to use the premises in a *tenantlike* manner, or in the case of lands, in a *husbandlike* manner, (*n*) and in general also according to the *custom* of the country where the lands are situate; (*o*) but an express lease or written agreement, as far as it speaks on the subject, would exclude the effect of any custom or usage, (*p*) and therefore where the declaration stated that the defendant was tenant to the plaintiff, and in consideration thereof that he promised to *use* the lands in a husbandlike manner, and the proof was of an agreement to *farm* lands in a husbandlike manner, to be *kept constantly in grass*, this was holden a fatal variance. (*q*)

It has been long settled that a mere tenant strictly at will is not bound to repair or prevent permissive waste. (*r*)

The remedies for waste, as in most other cases, are *preventive*, or for *compensation*, or for *punishment*. To *prevent* waste the landlord may in general, without express reservation, enter the premises to which he is entitled in remainder or reversion, to see whether waste has been committed, without being a trespasser; (*s*) or he may enter under a clause of forfeiture for waste; (*t*) or he may in some cases enter to repair, so as to prevent a forfeiture of his own leasehold estate; or he may file a bill in equity, and move for an injunction to prevent wilful waste; (*u*) or he may have in some cases a writ *de reparatione faciundo*; or he may sustain covenant or *assumpsit* for a breach of covenant made to himself or running with the land, (*x*) according to the contract; or an action on the case for wilful waste. (*y*) If wilful waste has been committed by a tenant for life or years to a considerable extent, then a writ of waste may be proceeded in for the recovery of the property wasted, and

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Remedies for waste in general.

(*l*) *Ante*, 390, n. (*k*); 1 R. & M. C. N. P. 355; 3 Bar. & Cres. 478; 1 M. & P. 183.

(*m*) 2 Bar. & Cres. 273.

(*n*) 5 T. R. 373; 4 East, 154; 1 Marsh. R. 567; 6 Taunt. 300, S. C.; Holt's C. N. P. 7; but see 2 Bar. & Cres. 273; 3 Dowl. & R. 522, S. C.

(*o*) 4 East, 154; 5 T. R. 376; Holt's C. N. P. 7; 1 Marsh. 569; 5 Bar. & Cres. 909.

(*p*) 1 Meriv. 15; 16 East, 71; 5 Bar. & Cres. 909; *ante*, 119.

(*q*) 5 Bar. & Cres. 909.

(*r*) Lit. s. 74; Co. Lit. 57, a.; 5 Co. 13, b.; Cro. Eliz. 777, 784; 3 Lev. 359; 1 Saund. 323, b.

(*s*) 8 Co. 146; 3 Bla. C. 212, 213; Com. Dig. Pleader.

(*t*) 1 Saund. 286.

(*u*) 4 Mad. 393; 5 Mad. 45; Chit. Eq. Dig. Practice, Injunctions, 1058; 3 Bla. C. 227, note (5).

(*x*) 32 Hen. 8, c. 31; 2 B. & Ald. 105; 4 B. & Cres. 157; 1 B. & Cres. 410; 9 B. & Cres. 505; 1 Cramp. & J. 105.

(*y*) *Ante*, 386, 389, 390; 1 Campb. 360.

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treble damages; but if the damage were very trifling, and merely nominal, that remedy might wholly fail. (z) In such an action the defendant must in general *plead* his matter of defence specially, and not merely the general issue *nul wast*; thus if the writ charge that he ploughed up ancient meadow land, and cut down timber, he must plead specially that the ploughing was resorted to according to the custom of the country and for the purpose of ameliorating the meadow, and that the timber was cut and used for necessary repairs. (a) If the waste, either wilful or permissive, have been committed contrary to a *lease* containing a clause of forfeiture and re-entry, then possession may be taken peaceably; (b) or an action of ejectment may be sustained, provided the covenant broken ran with the land, but not otherwise. (c) And it should seem that under the general terms of the statute against malicious injuries a remainder-man or reversioner might proceed summarily before a justice for any wilful or malicious injury affecting his interest, and not occasioning more than 5*l.* damages. (d)

An action on the case in the nature of waste lies at the suit of a landlord against his tenant, for acts done by the latter while holding over after the expiration of a notice to quit, (e) and the landlord of a tenant from year to year, although there be no reservation of the timber on the premises, may support an action of trespass *vi et armis* against a third person for carrying it away after it has been cut down. (f) And where a lessor during the term cut down some oak pollards growing upon the demised premises, which were unfit for timber, it was held that as the tenant for life or years would have been entitled to them if they had been blown down and was entitled to the *usufruct* of them during the term, the lessor could not by wrongfully severing them acquire any right to them, and consequently that he, or his vendee, could not maintain trespass against the tenant for taking them. (g) When trees are excepted in the lease trespass is sustainable and not case, (h) and if not excepted the interest of the lessor continues in the body of the trees, so that he may support trespass for carrying them away. (i) But if a lessor during the term cut down trees grow-

(z) *Keepers of Harrow School v. Alderton*, 2 Bos. & Pul. 86.

(a) *Simmons v. Norton*, 7 Bing. 640.

(b) *Ante*, 375.

(c) 32 Hen. 8, c. 31; 3 M. & S. 382; 2 B. & Ald. 103; 4 Bar. & Cres. 157; 1 Id. 410; 9 Id. 505; 1 Crömp. & J. 105.

(d) 7 & 8 Geo. 4, c. 30, s. 24.

(e) 1 Campb. 360.

(f) 2 Chit. Rep. 636.

(g) 5 Bar. & Cres. 897; 8 Dow. & Ry. 651, S. C.; but see *ante*, 261.

(h) 8 East, 196; *ante*, 261.

(i) 1 Saund. 322, n. 5; 7 T. R. 13; 2 Campb. 491; *ante*, 261.

ing upon the demised premises, which were fit only *for fire wood*, and the lessee take them away, trespass will not lie against the lessee at the suit of either the lessor or his vendee; *(k)* though if the trees had been fit for the purposes of reparation or sale it would have been otherwise. *(l)*

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We have stated the instances in which a parcener, joint-tenant or tenant in common, may sue his co-tenant at law for waste, as for cutting trees or underwood of sufficient growth; *(m)* but in general a bill in equity for, an injunction to prevent wanton and malicious waste, is the preferable proceeding between these parties. *(n)*

Injuries by Waste, or as between Parceners, Joint-tenants, and Tenants in Common.

By the custom of the realm, or rather by the general law, a succeeding incumbent may sue his predecessor, who has resigned, for *Dilapidations*; *(o)* but not for omitting ornamental repairs; *(p)* and even the executors or administrators of a deceased rector or vicar may by this law be sued; *(q)* although we have seen that in general no executor can be sued for a tort committed or permitted by his testator and not constituting the breach of a contract. And a successor may have separate actions against the executor of the late rector for dilapidations to different parts of the rectory; and though it has been usual in a declaration in such action to allege that assets of the deceased have come to the defendant's hands, that allegation is perhaps unnecessary, as the want of assets is matter of defence, and need not be thus anticipated by the plaintiff. *(r)*

Remedies for Ecclesiastical Dilapidations.

We have considered the several kinds of *Incorporeal property* and the rights thereto, *(s)* and we have seen that they are principally ancient lights, pews, commons, ways, watercourses, advowsons, tithes, offices, dignities, franchises of various kinds, as rights to hold courts, forests, chases, purlieus, parks, free-warrens, fisheries, corodies, and rents; *(s)* and we have at the same time noticed the injuries and offences, and remedies and punishments relating to the same. We may here observe that as regards any *civil* injury to *the right* to these, the *remedy* is

Injuries to INCORPOREAL Property.

(k) 8 Dow. & Ry. 651; 5 Bar. & Cr. 897, S. C.

(l) *Ante*, 261.

(m) 8 T. R. 145; 8 Bar. & Cres. 257; *ante*, 271, 272.

(n) *Ante*, 271, 272.

(o) Lutw. 146; 21 H. 8, c. 13; Burn's Eccl. L. Plurality.

(p) 10 B. & Cres. 299.

(q) Willes' Rep. 421; 5 Woodas. 205; 2 T. R. 636; Wats. Cl. Law, chap. 39; 3 Burn's Eccl. L. 146, 153; 3 Lev. 268; 1 Lutw. 106; 2 Chit. Pl. 785.

(r) Lit. Ent. 21, 67; but see Gibs. 733; 3 Keb. 619.

(s) *Ante*, 203 to 229.

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Remedies for
injuries to an-
cient lights. (x)

in general Case, not *Trespass*, though there are exceptions. (t) The *Injuries* are in general termed *Disturbances*, as of the right to ancient lights, pews, commons, ways, watercourses, advowsons, freewarrens, fisheries; (u) or *Subtractions*, as of rents-service and tolls by refusing to pay the same. (v) The injuries to *ancient lights* by obstruction and the remedies have already been considered. (x)

2. Remedies for
injuries to
Pews.

2. With respect to *Pews*, as the party entitled to the use thereof has not in legal contemplation the exclusive possession, but merely a right to sit therein to hear divine service, he cannot support trespass for a mere exclusion, though he might for personal violence; (y) and the proper remedy is an action on the case, (y) and a faculty granting a pew to a man, but not annexing it to some messuage, will not enable him to maintain an action at law for disturbance, and his only remedy in that case is in the Ecclesiastical Court. (z) It has been held however that thirty years' uninterrupted possession and use of a pew would *prima facie* enable a party to sue a stranger at law, (a) though it was considered that such presumptive title might be rebutted by proof that the pew had no existence thirty years ago; (a) and it has been held that as the declaration for disturbance of seats in a pew must state the pew as appurtenant to a messuage in the parish, and that otherwise a bare possession of the pew for sixty years or more is not a sufficient title to maintain an action on the case for disturbing the plaintiff in the possession thereof, but he must prove a prescriptive right or a faculty. (b) But those decisions were before the rule was established, that mere priority of possession shall be sufficient against a stranger who cannot show a better title, (c) and before the recent statute 2 & 3 Wm. 4, c. 70. (d)

3. Remedies
for injuries to
Common. (e)

3. The injuries to a right of *Common* of pasture are various; as by inclosing the waste over which the right of common exists, building thereon, planting trees, overstocking with rabbits, by either of which sufficiency of common is not left, or

(t) *Ante*, 203 to 229.

(u) See in general, 3 Bla. C. 236.

(v) See in general, 2 Bla. C. 230.

(x) *Ante*, 207, 208.

(y) 1 T. R. 430; 5 B. & Ald. 361; 8 B. & Cres. 294; 3 Bing. 137, 138; *ante*, 208.

(z) *Mainwaring v. Giles*, 5 B. & Ald. 356; 2 Saund. 175, e., n. 2.

(a) *Rogers v. Brand*, 1 T. R. 431; *Griffith v. Matthew*, 5 T. R. 296; 2 Saund. 175, n. 2.

(b) *Stokes v. Booth*, 1 T. R. 428.

(c) *Ante*, 274, 275.

(d) *Ante*, 285, 286.

(e) As to the right, see *ante*, 210 to 214.

by any person taking off the common manure dropped thereon, and thereby impoverishing the pasture, or by a stranger's turning on cattle, or by the lord or a commoner surcharging and turning on more than a proper quantity of cattle, or improper cattle, or by driving off the commoner's cattle, or by turning on diseased cattle.

The *remedies* for a commoner are either for *prevention* or for *compensation*, and some for *punishment*; as respects the *preventive* remedies, it should seem that if it be apprehended that the owner of the waste is about to inclose or build and not leave sufficiency of common, a Court of Equity would restrain the injury by injunction, at least until the sufficiency of common has been tried. (*f*) If a waste or common be surrounded by a fence placed *upon* the common, so that a person having right of common cannot turn on his cattle, he may justify prostrating such fence and opening a way for his cattle before he actually attempts to turn on, and he may even prostrate a large piece of the fence upon the common and much more than would be necessary for the convenient ingress and egress of commonable cattle, because in this case the *whole* fence being *upon* the common and injuring the pasture, a commoner might abate the *whole*; (*g*) and the exercise of such right to abate may be much more convenient than that the commoners should be compelled to bring an action for every obstruction, because when the fences are thrown down, the assertion of right may be decided in one action; (*h*) besides, the right of a single commoner might perhaps be questionable, whereas if several commoners concur in the abatement, they may all defend on the title of each, and if the right of one be established, though the others fail, a general defence would succeed. But if the fence were not *upon* the common but *on other* land, the commoner must then only open a *sufficient way* through the same. (*i*) And in all these cases the commoners act at the peril of the lord's having a right to approve, leaving sufficiency of common, and any excess or unnecessary damages would subject the commoner to an action; (*j*) and we have seen that a commoner cannot sue for an inclosure made with his consent, although most licenses are revokable. (*j*) If the lord insist on his right to place and con-

(*f*) *Quare*, 2 Vern. 301, 356; Chit. Eq. Dig. 219, 220.

(*g*) *Arlett v. Ellis*, 7 Bar. & Cres. 346, 362; 9 Id. 684; 2 Mood. C. N. P. 65; 6 T. R. 487; Com. Dig. Common, H.; 3 Chit. Pl. 5 ed. 1110; so a gate, wall, &c.

may be abated, 1 Saund. 353, b., n. 2.

(*h*) *Per* Littledale J. in 7 Bar. & Cres. 378.

(*i*) 1 Saund. 353, b., n. 2.

(*j*) 1 Car. & P. 141; *ante*, 338, note (*d*).

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tinue the fences, he may by bill restrain the commoners from prostrating the same, and obtain an issue for trial of the right; (*k*) and the right of the owner of the soil, whether the lord of the manor or waste, to approve and inclose, leaving sufficiency of common, is recognised and qualified by the statute of Merton and of Westminster. (*l*) A commoner cannot justify the prostration of *trees*, (*m*) nor the letting off water from a new pond made by the lord, (*n*) nor the killing rabbits surcharging the common. (*o*) Before the abatement it would be prudent (although not absolutely necessary) first to request the owner of the waste to remove the fence. (*p*) A commoner may also legally *drive* off the cattle of a stranger who has no right of common, or he may distrain the same, (*q*) though not the cattle of another *commoner*, (*r*) unless where the right of common is limited to a fixed number, in which case the excess might be distrained; (*s*) but commoners are advised not to proceed by distress, but rather to proceed by action on the case; (*t*) and he might file a bill in equity to prevent what might become a permanent injury to his right of common.

A commoner may always support an action *on the case* against the lord or any other person for inclosing or building, so as to occasion an insufficiency of pasturage, or for any disturbance of his right; (*u*) as by planting trees upon the waste whereby the pasturage has sensibly diminished, or for surcharging with rabbits, (*x*) or against any person for carrying off manure dropped on the common, however small the damage. (*y*) If the lord of a manor wantonly and unnecessarily exercise his manorial rights to the injury of persons entitled to common of pasture, he is liable to such action on the case. (*z*) If the commoner's cattle be chased off or hunted upon the common, then he has the election to sue in trespass or in case, and sometimes the former, in order to raise the question on the

(*k*) 2 Vern. 301, 356; Chit. Eq. Dig. tit. Common.

(*l*) 20 Hen. 3, c. 4; 19 Ed. 1, st. 1, c. 41; and see 3 & 4 Ed. 6, c. 3; 29 Geo. 2, c. 36, part repealed by 7 & 8 Geo. 4, c. 27, and cases thereon, Chit. Col. Stat. 155.

(*m*) 6 T. R. 487; 7 Bar. & Cres. 362.

(*n*) 1 Saund. 353, a., n. 2.

(*o*) Id. *ibid.*; *ante*, 187.

(*p*) See observation in *Earl Lonsdale v. Nelson*, 2 Bar. & Cres. 302; 2 Dow. & R. 556; a previous request does not seem to be necessary when the present owner of property has himself wrongfully erected the obstruction; but only in cases of omission.

(*q*) 1 Rol. Ab. 320, 405, pl. 5; Yelv. 104.

(*r*) 3 Wils. 287; 4 Burr. 2426.

(*s*) *Hall v. Harding*, 4 Burr. 2431; 1 Saund. 346, d., in notes.

(*t*) 1 Saund. 346, e., in note.

(*u*) Com. Dig. Action, Case, Disturbance, A 1. But no action lies if the common has been inclosed more than twenty years; 2 Taunt. 156, 160; 2 Bar. & Cres. 918; 7 Id. 346; unless he has given leave to build or inclose, *ante*, 338, n. (*d*).

(*x*) *Ante*, 187.

(*y*) 2 East, 154; 1 McClell. R. 373; Cro. Jac. 195.

(*z*) 4 Dow. & Ry. 318.

pleadings, will be preferable. (a) The injury by depasturing forests, commons, and open fields with sheep or lambs infected with scab or mange is specially provided against, (b) and other acts regulate the cultivation and improvement of common arable fields, wastes, and commons; (c) and the general inclosure act contains provisions very extensive in their operation. (d)

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4. Injuries to *ways* are either by obstructions independently of contract, or founded on express contract, or the same may be by neglect to repair the way. The obstruction to a private or public way may in general be *prevented* by removing the impediment, but which must, at least in the case of a private way, be effected in a careful manner, so as not to unnecessarily injure the materials; (f) though in the abatement of a nuisance to a *public* way no such precaution is supposed to be necessary. (g)

4. Remedies for injuries to WAY. (e)

Case is the proper form of action for an obstruction of a *private* way, whether the defendant had or not expressly covenanted for the enjoyment, though an action on the contract would be sustainable, (h) though in the latter case it might be incorrect to aver that the right of way was by reason of possession when it was independent of such possession, (i) and even a reversioner may sue in case for an apparent permanent obstruction to a private way. (k) *Case* is also the proper remedy for a material obstruction of a *public* way, if the plaintiff has sustained particular and material damage. (l) In general the party entitled to the use of a private way is bound to *repair* it as far as respects his own enjoyment, and he cannot then traverse the adjoining land; (m) but in some cases the owner of the land over which a private way passes is bound to repair the same, (n) and in that case the suffering the way to be much out of repair constitutes another injury, for which *case* may be supported. The proceedings for injuries to *public* ways will be considered amongst *public injuries*. (o).

(a) 1 Chit. Pl. 5 ed. 162.

(b) 38 Geo. 3, c. 65.

(c) 13 Geo. 3, c. 81; *Whiteman v. King*, 2 H. Bla. 4.

(d) 41 Geo. 3, c. 109; 1 & 2 Geo. 4, c. 23; and notes to Chit. Col. Stat. 163 to 176.

(e) As to the rights to private ways, ante, 214; and see 1 Tho. Co. Lit. 642, 644.

(f) See pleas justifying removals of obstructions, 3 Chit. Pl. 5 ed. 1116 to 1129.

(g) 2 Salk. 458.

(h) 3 Wils. 348; 2 Bla. R. 848, S. C. See the observations of Holroyd, J. 6

Bar. & Cres. 273.

(i) 4 East, 107; 6 Id. 438; 15 Id. 108,

3 Taunt. 24; 5 Bar. & Cres. 221.

(k) 4 Burr. 2141; 2 Chit. Pl. 5 ed. 810, a.

(l) *Ante*, 11, n. (h); see Willes, 71; 3 Mau. & S. 472; 4 Id. 101; 16 East, 196; 2 Bing. 263; 1 Tho. Co. Lit. 642.

(m) *Taylor v. Whitehead*, Doug. 745; 4 Mau. & S. 387.

(n) *Rider v. Smith*, 3 T. R. 766; 1 Saund. 322, a., n. 3; 1 Tho. Co. Lit. 235, note D. 1.

(o) 2 Saund. 113, n. 1; 172, a., n. 1; Ld. Raym. 1096; 3 T. R. 766.

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5. Remedies
for injuries to
WATER-
COURSES. (p)

5. Injuries to mere WATERCOURSES are usually *nuisances* by obstructing the course of the water or by an undue addition to or subtraction from the force of the water, or by poisoning or injuring the same. (q) The remedies are either *preventive* or for *compensation* or *punishment*. To *prevent* a wrongful continuance of an obstruction made by a person on his own land, the party thereby injured may legally enter and abate the nuisance, (q) and a Court of Equity would interfere by injunction to prevent any serious injury to a watercourse. (r)

If the party interested in a watercourse were also owner of the soil or banks thereof, then the remedies would be ejectment or trespass, according to the nature of the right and the time of enjoyment and injury; (s) but if he had only the use of the water, or the injury were not immediate, then the remedy should be an action on the case. (s) Trespass however lies for entering a *several* fishery and taking fish therefrom. (t)

6. Remedies
for injuries by
disturbance of
patronage in an
ADVOWSON.

6. Injuries to the right of *Advowson* (which we have seen is the right to present a clerk to the Bishop of the diocese in order that he may be instituted to a church) is the disturbance of and refusal to give effect to that right. (u) The proper remedy for this injury is an action of *quare impedit*, in which, if the patron succeed, he recovers two years' value of the church, if the turn of presentation has been lost by the resistance. (x) We shall consider this remedy more fully hereafter.

7. Remedies for
injuries to the
right to TITHES.

7. We have stated many of the remedies relating to *Tithe* when considering the *right*; (y) The remedies are either for injuries to the tithe-owner or to the occupier of the land.

If the right of the *Tithe-Owner* to the tithe of a parish be disputed he may try his right in ejectment; (z) or by suit in equity, upon which an issue may be directed to try the right, if still disputed. If there be a *Modus*, then also a suit in equity or in the Exchequer will be proper; but if only a *particular parishioner* dispute the right and neglect to set out predial tithe in kind, (excepting of agistment,) then he may be sued in *debt* upon the statute, for not duly setting out tithe in kind, and for treble the value, (a) but in which *no costs*

(p) See the rights considered *ante*, 189 to 193, 197, 198, 200, 215, 224.

(q) 2 Smith's R. 9.

(r) *Ante*, 191, 192.

(s) *Ante*, 189, 190.

(t) *Ante*, 224.

(u) *Ante*, 215 to 218.

(x) *Ante*, 217.

(y) *Ante*, 218 to 221.

(z) *Ante*, 218; 32 H. 8, c. 7, s. 7; Cro. Car. 301; Ld. Raym. 789; 2 Saund. 304, n. 12; when not, 2 Roll. 307; 3 Bla. 88.

(a) 2 & 3 Ed. 6, c. 13, s. 1; 8 East, 178; 3 Anstr. 763; Moore, 915; 2 Chit. Pl. 5 ed. 496, and note.

will be recoverable if the single value *exceed* 6*l.* 13*s.* 4*d.* (b) If the tithe were duly set out, but the occupier turn in his cattle and they damage the tithe, he may be sued in *trespass* for such injury, (c) and he has a right to remove the tithe by the ordinary way, (d) and if obstructed he may sue for that injury or remove the obstruction. (e) If there were by *agreement* a *composition* to take money instead of tithe in kind, then the same will be recoverable in an action of *assumpsit* or debt, as in the ordinary case of contract; (f) or for tithe not exceeding 10*l.* we have seen there is a summary remedy before two justices. (g)

On the other hand, *the occupier* is, according to the custom of the parish, to give due notice to the tithe owner to attend and see the tithe, or, in the absence of particular custom, he is to set out the tithe himself, and give notice to the tithe-owner of having done so, and of his intention to carry his crop, and request the tithe-owner to come and see the tithe as set out; (h) and if the latter do not duly attend, the occupier is to set out the tithe himself, and leave the entire crop in the field for a reasonable time, so as to enable the tithe-owner to compare the tithe with the residue before he removes any part of the crop in the field. (i) If the tithe-owner do not remove the tithe within a reasonable time, (k) the occupier may *distrain* the same damage feasant, (l) or he may support an action on the *case*, but not *trespass*, for the neglect and consequential damage to growing grass, &c.; (b) but he cannot legally turn cattle into the close where the tithe remains, and if he should do so, and they damage the tithe, he will be subject to an action of *trespass* to compensate the damage. (m)

The remedies for injuries to *other incorporeal real* property, such as Franchises, Rights to hold Courts, Markets, Fairs, Free-warren, &c. &c., are in general an action on the *case*, but

Remedies for injuries to OTHER INCORPOREAL PROPERTY.

(b) *Ante*, 218; and therefore it is frequently better to proceed in a Court of Equity, as the Exchequer, *ante*, 218; 2 Inst. 651; or when in *Spiritual Court*, 3 Bla. C. 88, 89.

(c) 8 *W. R.* 72.

(d) 2 *New R.* 466; 3 *Bro.* 9, 17; 1 *Bro.* 187.

(e) *Id.* *ibid.*; *Cro. J.* 224; *Yelv.* 157; *Com. Dig. Pleader, F.* 18, 19.

(f) In *assumpsit*, 4 *Madd.* 177; 2 *Chit. R.* 405; 1 *Lev.* 141; *Sid.* 222; 2 *Chit. Pl.* 5 ed. 578; or *debt*, with a count for not setting out the tithe in kind, *Bul. N. P.* 88.

(g) *Ante*, 221.

(h) As to the notice, see 1 *Roll. Ab.* 68; 1 *Stra.* 245; 3 *Burr.* 1892; 11 *East*, 358; as to the custom of tithing, *Id.* *ibid.*; 3 *B. & Cres.* 213; 3 *Esp. R.* 31.

(i) 2 *Taunt.* 55.

(k) What time is or not reasonable, 11 *East*, 358; 3 *B. & Cres.* 213; 3 *Bulstr.* 336; 1 *Lord Raym.* 189; 1 *Stra.* 245; *Latch.* 8.

(l) 8 *T. R.* 72.

(m) 8 *T. R.* 72; 10 *East*, 5; 1 *Lord Raym.* 187; 1 *Stra.* 245; 3 *Burr.* 1891; 1 *Roll.* 109.

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as these do not very frequently occur in practice, we shall merely refer to the books where they are principally noticed. (*n*)

III. Of CRIMINAL INJURIES and OFFENCES to Real Property, and their Preventions and Punishments.

. III. When considering each kind of Real Property, we have stated most of the modern enactments for *preventing* and *punishing* injuries and offences affecting them when of a *criminal* nature; as in respect of what *Buildings* the offence of Burglary, (*o*) or in the nature of Larceny, (*p*) or Malicious Injuries, (*q*) as Arson, (*r*) &c. may be committed, or for which the Hundred may be liable to make compensation, (*s*) and what offences in inclosed yards, gardens, orchards, nursery grounds, hothouses, greenhouses, and conservatories, or in ground adjoining or belonging to a dwelling-house, are particularly and how punishable. (*t*) We have also noticed Forcible Entries and Detainers, (*u*) and what criminal Injuries to Mines are punishable; (*x*) also what injuries committed in Hare and Rabbit Warrens and Preserves, or in respect of Game, are declared penal. (*y*) Also what criminal injuries to Water, Watercourses, Fisheries, Fish-ponds, and Dams, and Oyster-beds, (*z*) Navigable Rivers, Creeks, Canals, Quays, Docks, and Wharfs, (*a*) Sea-Banks and Walls, Ports and Harbours, Lighthouses, Beacons, and Sea Marks, (*b*) are punishable, and how. We have also shown the criminal injuries to Hedges and Fences, (*c*) to Bridges, (*d*) Highways, (*e*) Toll-gates, and Weighing Engines, Rail Roads, &c. (*f*) Other criminal injuries which affect the private interests of individuals have also been noticed. It will be observed, that the recent enactments repeal (*g*) and afterwards consolidate and re-enact, in an amended form, *most* of the former punishments of offences against real property, and introduce new provisions, so that most of the offences which either partake of the crime of *Larceny*, or of *Malicious Injuries*, as respects real property, will be found in the statutes 7 and 8 Geo. 4, c. 29 and 30, and the pecuniary compensation recoverable from the *Hundred* in the statute 7 and 8 Geo. 4, c. 31. But there are still several *parts* of the ancient *Common Law*, and

(*n*) 2 Saund. R. Index, Fair, Market, Franchise; 3 Tho. Co. Lit., Index, Franchise, Hereditaments; 2 Chit. Pl. 5 ed. 818, c.

(*o*) *Ante*, 169 to 177.

(*p*) *Ante*, 171.

(*q*) *Ante*, 172, 164.

(*r*) *Ante*, 172.

(*s*) *Ante*, 172, 173, *post*, ch. vi.

(*t*) *Ante*, 176 to 179.

(*u*) *Ante*, 181.

(*x*) *Ante*, 186.

(*y*) *Ante*, 186.

(*z*) *Ante*, 189 to 193.

(*a*) *Ante*, 189.

(*b*) *Ante*, 189.

(*c*) *Ante*, 196.

(*d*) *Ante*, 199.

(*e*) *Ante*, 200.

(*f*) *Ante*, 202, 203.

(*g*) 7 & 8 Geo. 4, c. 27.

several ancient as well as modern enactments to repress offences to real property still in force, and not affected by these recent acts, such as the common law indictment for forcible entries, and the statutes against such offences, also the statutes against night poaching, against game, and a few other provisions.

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1. At common law a *forcible entry* is still an offence which may be prevented by force, though a dangerous instrument must not be used, (*h*) or is indictable, merely charging that the offenders with force and with a strong hand broke and entered the messuage, &c.; (*i*) but a mere entry by several persons on *land*, and without using dangerous weapons, nor committing any attack on the person or other actual breach of the peace, is not indictable, being considered as a mere trespass remediable by action of trespass. (*k*) And though a conviction has taken place for indecorously firing a gun laden with shot and breaking church windows, no person being therein at the time or put in terror, the propriety of such conviction may be questionable. (*l*) The statutes against forcible entries also enable justices to proceed summarily against offenders and restore possession by a proceeding which is pointed out in the last chapter of this volume, and which, from the speedy redress they afford, deserve to be acted upon, though now in a great measure obsolete. Another statute against forcible entries affords not only punishment, but compensation and restitution of possession, upon conviction under an indictment; but that remedy is only given to the freeholder, and not to a mere occupier, and as the prosecutor would be interested in the result, he would not be a competent witness. (*m*)

1. Forcible
Entries.

2. With respect to *night poaching*, the 9 Geo. 4, c. 69, s. 1, enacts that if any person by *night*, (that is, between an hour after sunset and an hour before sunrise,) unlawfully take or destroy any game, (*n*) or any rabbit, in any lands, whether open or inclosed, or shall by night unlawfully enter or be upon the land, whether open or inclosed, with any gun, net, engine, or other instrument, for the purpose of taking or destroying game; (*n*) such offender shall, upon conviction thereof before two justices of the peace, be committed for the *first* offence to the common gaol or house of correction for any period not exceeding *three*

2. Night poach-
ing.

(*h*) *Ante*, 373.

(*i*) 8 T. R. 78, 299; 1 Saund. 296.

(*k*) 3 Burr. 1698, 1731.

(*l*) 2 Chitty's Crim. L. 23.

(*m*) *Rex v. Williams*, 9 Bar. & Cres.

549; *Rex v. Bevan*, R. & M. C. N. P. 242.

(*n*) Defined in 13th section to be hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards.

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calendar months, there to be kept to hard labour, and at the expiration of such period shall find securities by recognizance, or in Scotland by bond of caution, of himself in 10*l.* and two securities in 5*l.* each, or one surety in 10*l.*, for his not so offending again for the space of one year next following; and in case of not finding such sureties, shall be further imprisoned and kept to hard labour for the space of six calendar months, unless such sureties are sooner found. The punishment of a *second* offence is six months imprisonment, and to be kept to hard labour, and to find sureties; and for a *third* offence the offender is liable to transportation. The 2d section, where any person shall be *found* upon any land committing any such offence, authorizes the owner or occupier of such land, and other specified persons, to seize and apprehend such offender upon such land, or, in case of pursuit being made, in any other place to which he may have escaped therefrom, and to deliver him as soon as may be into the custody of a peace officer, in order to his being conveyed before two justices of the peace; and in case such offender shall assault or offer any violence with any gun, cross-bow, fire-arms, bludgeon, stick, club, or any other offensive weapon whatsoever, towards any person thereby authorized to seize and apprehend him, he shall, whether it be his first, second, or any other offence, be guilty of a *misdemeanor*, and shall be liable, at the discretion of the court, to be transported for seven years, or to be imprisoned and kept to hard labour in the common gaol or house of correction for any term not exceeding two years. The 4th section limits the summary proceeding to six, and indictment to twelve, calendar months; and the 5th, 6th, and 7th sections give the form of conviction and proceedings on appeal, and take away any removal by *certiorari*. Upon this enactment it will be observed, that the omission of the words "forest, chase, park," &c. in this act, which were in the prior act, is immaterial, as they would unquestionably be included under the comprehensive words, "open or inclosed grounds."^(a) The word "*found*" in this act means "having been seen or discovered;"^(p) and if gamekeepers attempt to apprehend persons armed with offensive weapons, who are poaching in the night, and one of the gamekeepers be shot by one of the poachers, this will be murder in all, unless it be shown that either of the poachers separated himself from the rest, so as to establish that he did not join in the act;^(q) and where gamekeepers had seized two persons

(a) *Rex v. Parkhurst*, Russ. & R. C. C. 503.

(p) *At.-Gen. v. Delane*, 1 Pri. R. 383.

(q) *Rex v. Edwards*, 3 Car. & P.; *Rex v. Whitehouse*, Russ. & R. C. C. 99.

who were poaching in the night, and they, having surrendered, called to a third, who came up, and he killed one of the keepers, this was held to be murder in all, though the two struck no blow, and though the keepers had not announced in what capacity they had apprehended them. (r)

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The same act, s. 9, enacts "that if any persons, to the number of three or more together, shall by *night(s)* unlawfully enter or be in any land, whether open or inclosed, for the purpose of taking or destroying *game(t)* or rabbits, any such persons being armed with any gun, cross-bow, fire-arms, bludgeon, or any other offensive weapon, each and every of such persons shall be guilty of a *misdemeanor*, and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond seas, for any term not exceeding fourteen years nor less than seven years, or to be imprisoned and kept to hard labour for any term not exceeding three years."

In an indictment upon the 9th section of this act, as well as under the repealed act, 57 Geo. 3, c. 90, it must be expressly averred, not only that the offender did by night unlawfully enter divers closes, but also that they were there *by night*, armed with guns and offensive weapons, for the purpose of taking and destroying game; and where the allegation was merely that the defendants *entered* by night, and that they were *then and there* armed, &c., without repeating "*by night*," the indictment was holden insufficient. (u)

3. The *Game Act*, 1 & 2 W. 4, c. 32, (repealing all the previous acts relating to game,) contains several enactments, principally of a *penal* rather than a criminal nature, and most of which we have indeed already noticed, (v) but which it may be useful here to consider together. The object of the statute 9 Geo. 4, c. 69, was to prevent and punish *night poaching*, whereas the game act was *principally* to *prevent* and *punish* (but not to *compensate*) *day poaching*; and the 34th section defines *day-time*, as respects this act, to commence at the beginning of the last hour before sunrise, and to conclude at the expiration of the last hour after sun-set; so that the two acts leave not an instant of time uncovered. The second section defines "game" to include, for all purposes of that act, hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards; as to

3. Game Act,
1 & 2 W. 4, c. 32.
Punishments
under it.

(r) *Rex v. Whitehouse*, Russ. & R. C. C. 99.

(s) See *ante*, 401.

(t) *Id. ibid.*

(u) *Davies and others v. The King*,
10 Bar. & C. 89.

(v) *Ante*, 186 to 188.

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woodcocks, snipes, quails, landrails, and conies, they are afterwards in some clauses particularly mentioned. The third section prohibits the killing or taking game, or using any dog, net, or other engine or *instrument*, for the purpose of killing or taking game on a Sunday or Christmas-day, and subjects the offender to not exceeding 5*l.* penalty and costs on conviction before two justices; and the killing any partridge between the 1st of February and 1st of September, or any pheasant between the 1st of February and 1st of October, or any black game, (except in Somersetshire, or Devon, or in the New Forest,) between the 10th December and 20th August; or in the three excepted places between the 10th December and 1st of September, subjects the offender to forfeit not exceeding 1*l.* for each head of game, on the like conviction. And if any person, with intent to destroy or injure any game, shall put or cause to be put any *poison* or *poisonous ingredient* on any ground, whether open or inclosed, where game usually resort, or in any highway, he is to forfeit not exceeding 10*l.* and costs, on like conviction. The 4th section declares illegal, and subjects to pecuniary penalties, dealers having game in their possession ten days after the appointed time, and other persons having in possession forty days after the appointed time, unless in breeding places. The 7th to the 17th section inclusive vest the right to kill game in the owners of land and in lessees, or parties acting under express reservations in leases, or by their permission. The 18th to the 24th section relate to *licenses* to sell and *certificates* to kill game. The 24th section enacts that if any person, not having the right or license to kill game upon any land, shall *wilfully* take from the nest or destroy in the nest upon such land the *eggs* of any bird of game, or of any swan, wild duck, teal, or widgeon, or shall knowingly have in his house, shop, possession, or controul, any such eggs so taken, he shall forfeit, on conviction before two justices, for every such egg not exceeding five shillings, with costs. The 25th to the 30th section contain regulations and penalties against selling or buying game of persons not duly licensed.

The 30th section subjects any person who shall commit any *trespass* by entering or being in the *day-time* upon any land in search or pursuit of game, or woodcocks, snipes, quails, landrails, or conies, on conviction before one justice, to a penalty not exceeding 2*l.* with costs; and if five persons or more *together* commit such trespass, each forfeits not exceeding 5*l.* and costs; and the section then provides that such offender, by

way of defence, may prove any matter that would have been an answer to a common law action for trespass; but that the license of the occupier shall not be any defence, unless he had the reserved right of killing the game. And the 31st section contains a strong power, authorizing the person having the right to kill game, or the occupier, &c. to apprehend and detain, not exceeding twelve hours, and take before a justice, such a trespasser *found on any land*, unless he forthwith quit the land, ^(w) and also tell his real name and place of abode; or if he give such a general description of the latter as shall be illusory for the purpose of discovery. The 32d section enacts, that if five or more such trespassers *together* shall *be found* on any land in search of game, &c. in the day-time, and any of such persons shall be armed with a gun, and shall by violence, intimidation, or menace, prevent or endeavour to prevent any person, authorized as aforesaid, from approaching such persons so found, for the purpose of requiring them or any of them to quit the land whereon they shall be so found, or to tell their or his christian name, surname, or place of abode respectively as aforesaid, every person so offending by such violence, intimidation, or menace, and every person aiding or abetting such offender, shall, on conviction before two justices, forfeit not exceeding 5*l.* with costs, in addition to the previous forfeiture under the 31st section. Trespassers in pursuit of game in his Majesty's forests, parks, chases, or warrens, are subjected to 2*l.* penalty and costs.

The 35th section then provides that the enactments shall not extend to any person hunting or coursing upon any lands with hounds or greyhounds, and being *in fresh pursuit* of any deer, hare, or fox *already started upon any other land*, nor to any person *bonâ fide* claiming and exercising any right or reputed right of free-warren or free-chase, nor to any gamekeeper lawfully appointed and within his limits. It should seem therefore that this act would extend so as to prevent persons with hounds or greyhounds, without leave, from beating or searching for fresh deer, hare, or fox, not already started.

The 36th section enacts that when any person shall *be found by day or by night* ^(x) *upon any land* in search or pursuit of game, and shall then and there have in his possession any game which shall appear to have been recently killed, any person

(w) As to the meaning of the term "found, &c." see *Attorney-General v. Delane*, 1 Price R. 383, post, ch. vii. fully.

(x) See the meaning of the word "found,"

ante, 402. This is the only clause in the act which relates to offences in the night-time.

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entitled to kill game on such land, or the occupier thereof, &c. may demand the same, and if not immediately delivered up, may seize and take the same for the use of the person entitled to the game upon such land. (y) The 37th section gives the penalties, (the application of which is not otherwise directed,) not as heretofore, for the benefit of the poor of the parish, but to be paid to the overseers to the use of the general county rate, and every inhabitant of the county is a competent witness. The 38th section gives the justices a discretionary power to direct the time of payment of any penalty; and that in default of payment the imprisonment shall not exceed two calendar months, when the penalty does not amount to 5*l.*, and three calendar months in other cases; the imprisonment to cease on payment of the amount and costs. The 39th and following sections give a particular form of conviction, and authorize an appeal to the next general or quarter sessions, but take away removal by *certiorari* or otherwise. But the 46th section enacts that its provisions shall not prevent any person from proceeding by way of *civil action to recover damages in respect of any trespass upon his land*, whether committed in pursuit of game or otherwise, save and except that where any proceedings shall have been instituted under the provisions of that act against any person for or in respect of any trespass, no action at law shall be maintainable for the same trespass by any person at whose instance or with whose concurrence or assent such proceedings shall have been instituted, but that such proceedings shall in such case be a bar to any such action, and may be given in evidence under the *general issue*. (z) The act concludes with the usual provision for the protection of persons *bonâ fide* intending to act under its provisions as respects the venue, limitation of actions, notice of action, pleading the general issue, and tendering amends, or paying adequate compensation into court.

4. Offence of setting SPRING-GUNS, and as to dog-spears.

4. The practice of setting *Spring-Guns* and *Dog-Spears* and other dangerous engines, in order to prevent or deter persons from committing or suffering their dogs to commit depredations or injuries to property, will be considered in a subsequent chap-

(y) See the antecedent enactment, 5 Ann. c. 14, s. 4; and *Bird v. Dale*, 7 Taunt. 560.

(z) Without this express enactment the former recovery or proceeding must have been pleaded specially; and it may still

be advisable in some cases to plead specially in order to narrow the evidence or compel the plaintiff to new assign, 3 Burr. 1353; 3 Car. & P. 489; 1 Chit. R. 513, note (f'), 545, 613, 672.

ter. (a) It may suffice here to notice that the setting spring-guns, excepting at night within a dwelling-house, is now expressly declared to be illegal, and would subject the offender to an indictment for a misdemeanor, although no actual injury has ensued; (b) and the right even to set dog-spears is very questionable; (c) and another expedient to prevent trespass will be found in the part of the work referred to.

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5. The 7 & 8 Geo. 4, c. 30, s. 24, after providing *particularly* for malicious injuries to Real Property when of *considerable* importance, contains the following comprehensive enactments for the *punishment of any wilful or malicious damage, injury, or spoil, where the damages do not exceed five pounds, or where the prosecutor is content to treat the damages as limited to that sum; and unless when the prosecutor is himself examined as a witness, he may, by this prescribed summary proceeding before a magistrate, recover pecuniary compensation to that extent.* The enactment is, "That if any persons shall wilfully or maliciously commit any damage, injury, or spoil, to or upon any real or personal property whatsoever, whether of a public or private nature, for which no remedy or punishment is hereinbefore provided, every such person being convicted thereof before a justice of the peace shall forfeit and pay such sum of money as shall appear to the justice to be a reasonable compensation for the damage, injury, or spoil so committed, not exceeding the sum of five pounds, which sum of money shall, in the case of private property, be paid to the party aggrieved, except where such party shall have been examined in proof of the offence; and in such case, or in the case of property of a public nature or wherein any public right is concerned, the money shall be applied in such manner as every penalty imposed by a justice of the peace under this act is herein-after directed to be applied; and if such sum of money, together with costs (if so ordered), shall not be paid either immediately after the conviction or within such period as the justice shall at the time of the conviction appoint, the justice may commit the offender to the common gaol or house of correction, there to be imprisoned only, or imprisoned and kept to hard labour, as the justice shall think fit, for any term not exceeding two calendar months, unless such sum and costs

5. Wilful or malicious injuries to property not exceeding five pounds under 7 & 8 Geo. 4, c. 30, s. 24.

(a) *Post*, ch. vii.
(b) 7 & 8 Geo. 4, c. 18; see form of indictment, Burn's J. 26 ed. tit. Spring Guns. An action lies for any injury,

Bird v. Hollbrook, 4 Bing. 642, *post*, ch. vii.

(c) *Deane v. Clayton*, 1 J. B. Moore, 242.

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be sooper paid: Provided^(d) always, that nothing herein contained shall extend to any case where the party trespassing acted under a fair and reasonable supposition that he had a right to do the act complained of, ^(d) nor to any trespass, not being wilful or malicious, committed in hunting, fishing, or in the pursuit of game; but that every such trespass shall be punishable in the same manner as *before* the passing of this act.”^(f)

The 25th section enacts, “That every punishment and forfeiture thereby imposed on any person maliciously committing any offence, whether the same be punishable upon indictment or upon summary conviction, shall equally apply and be enforced whether the offence shall be committed from malice conceived against the owner of the property in respect of which it shall be committed or otherwise.”

The 28th section, for the more *effectual apprehension* of all offenders against this act, enacts, “That any person *found committing*^(g) any offence, whether punishable upon indictment or upon summary conviction, may be *immediately apprehended*, without a warrant, by any peace-officer, or the owner of the property injured, or his servant, or any person authorized by him, and forthwith taken before some neighbouring justice.”

The 29th section requires summary proceedings to be commenced within three calendar months, and enacts that the evidence of the party aggrieved and also that of any inhabitant of the county shall be admitted; and the 30th section directs how the party charged is to be *summoned*; and if he do not appear, the justice may either proceed *ex parte* or issue his warrant, or a warrant may be issued in the first instance. The 31st section subjects abettors of offences punishable summarily to the like penalties.

The 32d section enacts that the money forfeited for any injury shall be paid to the party aggrieved, excepting when he has been examined as a witness, and then, or in case he be unknown, to be paid the same as any penalty; and every sum to be imposed as a penalty is to be paid to the overseers of the poor or other officer as directed by the justice, and to the use

(d) This was to provide for *bona fide* claims of right, see *Kennerley v. Orpe*, Dougl. 517; but it must be some *fair and plausible* colour of title. *Hunt v. Andrews*, 3 Bar. & Ald. 341; *Calcraft v. Gibbs*, 5 T. R. 19; *Grant v. Hutton*,

1 Bar. & Ald. 134; 1 Burn's J. tit. Convictions, 26 ed. 832, 833.

(f) See now the Game Act, 1 & 2 W. 4, c. 32.

(g) *Ante*, 402, n.(p); and see *post*, ch. vii. fully as to apprehension without warrant.

of the general county rate. And the 33d section provides, that if the damage or penalty be not paid, the offender is to be imprisoned, with or without hard labour, for a term not exceeding two calendar months, where the sum and costs to be paid do not exceed 5*l.*; or four months, if above that sum; and not more than 10*l.*, or not exceeding six months, in any other case, determinable on payment.

The 34th section enables a justice, after a first conviction, to discharge the offender upon his making such satisfaction to the party aggrieved for damages and costs, or either, as shall be ascertained by the justice. The 35th section enables the king to pardon the party imprisoned; and the 36th section enacts "That in case any person convicted of any offence punishable upon summary conviction shall have paid the sum adjudged to be paid, together with costs, or shall have received a remission thereof from the crown, or shall have suffered the imprisonment awarded for nonpayment thereof, or the imprisonment adjudged in the first instance, or shall have been discharged from his conviction in the manner aforesaid, in every such case he shall be released from all further or other proceedings for the same cause."

The act then gives a form of conviction and allows an appeal to the sessions, but takes away removal by *certiorari* or otherwise, and contains the usual provisions for the protection of persons *bonâ fide* intending to act under the act. (*h*)

The provisions of *this* act, and of that relating to *day poaching*, render it unnecessary to proceed by action for small trespasses on land when actual damage has been committed not exceeding *five pounds*, or when there is not any *substantial right* to be tried, or when the wrong-doer could not consider that he had a right to do the act complained of, or when he did not commit it in hunting, fishing, or in pursuit of game, without previous notice, or when on any other account, as the rank or situation of the parties, it might be inexpedient to adopt such summary proceedings. The terms of the enactment apply to every injury that can be deemed *wilful or malicious*, and whether the property affected were public or private; but still the supposed injury must have been *wilful or malicious*, and so charged, (*i*) and it must have actually occasioned some *sensible real damage*, and not a mere trespass *in law*; and therefore the mere fact of trespassing and walking over a party's

(*h*) Sect. 41.

(*i*) *Rex v. Turner*, R. & M. C. C. 239.

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grass is not a trespass within this act, though in point of law a common action of trespass might be sustainable; (j) and for the same reason the power to apprehend, given by a prior, now repealed, act, does not extend to a mere trespasser in walking over a field without any right of way. (k) So the act only extends to the party who actually committed a wilful or malicious injury to real or personal property, and consequently if some persons wilfully sever a fence from the land and thereby damage it, and another person, not one of them, afterwards carry away part of such fence so previously separated, the latter cannot be committed for so carrying it away, though the original parties might have been convicted for the prior injury. (l) The justice is not as a matter of course to adjudge 5*l.* to be paid, but must ascertain what the value of the actual damage in each case has been, and award reasonable compensation according to the amount of the actual injury proved. (m)

6. Other criminal injuries and offences relating to real property in nature of larceny or of arson, &c., provided for by 7 & 8 Geo. 4, ch. 29, 30, 31.

6. With respect to the *other* crimes and offences to real property, and the remedies against the hundred, the 7 & 8 Geo. 4, c. 27, repealed most of the prior enactments, excepting those we have considered relative to forcible entries and detainers, and a few others, which still remain provided for either at common law or by the particular enactments we have just considered. And the 7 & 8 Geo. 4, c. 29, contains the *new enactments* relative to offences partaking of *larceny*, such as burglaries, sacrilege, housebreaking, robberies in houses, and other enumerated buildings and places, especially in parks and places where deer are usually found, warrens, fisheries, trees, shrubs, fruit, vegetables, and offences by separating or stealing glass, wood-work and fixtures, and materials, from the buildings or land, whether by lodgers or others. (n)

The 7 & 8 Geo. 4, c. 30, besides the general clauses against *small* injuries not exceeding *five pounds*, which we have just noticed, (o) contains the new and particular enactments against *considerable malicious injuries*, as by burning or arson, or riotous demolition in part or in the whole of certain buildings, or setting fire to or drowning coal or other mines, destroying sea-banks, damaging any navigation, public bridges, setting

(j) *Butler v. Turley*, 2 Car. & P. 585.

(k) *Per Best*, C. J. *Dewey v. White*, M. & M. C. N. P. 56.

(l) *Rex v. Harper*, 1 Dowl. & R. 223; see the form, Burn's J. 26 ed. tit. Ma-

licious Injuries.

(m) *Rex v. Harper*, 1 Dowl. & R. 223.

(n) See the enactments and some decisions thereon, *ante*, 161 to 203.

(o) *Ante*, 407.

fire to any crop of corn, grain, or pulse, whether standing or cut down, or to any heath, gorze, furze, or fern wheresoever growing, destroying or injuring trees, shrubs, fruit, or vegetables, fences, walls, gates, or stiles ; (p) and the attempt to commit arson, although unsuccessful, was considered a misdemeanor at common law. (q)

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The Hundred act, 7 & 8 Geo. 4, c. 31, contains the enactment defining the injuries and offences for which the hundred are liable to make private compensation, and prescribing the proceeding to enforce such compensation, which, though before limited to 200*l.*, is now to be the full extent of the injury. These injuries are now confined to arson, or setting fire to, or in part or in the whole demolishing, houses and certain specified buildings, and those only when committed by several persons feloniously, riotously, and tumultuously assembled. (r) The liability of the hundred to make compensation for other injuries was repealed by the 7 & 8 Geo. 4, c. 27.

When considering each particular kind of Real Property, the above enactments, as applicable to each, have been stated, and we shall not therefore repeat them. (s) It will be observed that many of the enactments are merely repetitions in the same terms as in the former repealed acts, and consequently many former decisions and parts of treatises will continue to be applicable. Thus the term "*Burglary*" is used as before, although the place where it may be committed has been properly limited and fixed to the principal mansion, or to some building immediately connected with the same, and no longer extends generally to the whole curtilage ; (t) but as to the hour or time of the night when the offence may be committed, that is regulated and to be ascertained by the former decisions. (u) Anciently the day was accounted to begin only at sun-rising and to end immediately upon sun-set, but the present rule is, that if there be day-light or twilight (v) enough begun or left to discern a man's face, the entry cannot be deemed burglarious. (x) It will be observed, that although, as to night poaching and day poaching, the legislature have defined the precise time when night and day shall be deemed to commence, (y) the precise time when burglary may be committed is left to proof as to the degree of light

(p) See the enactment and decisions, ante, 161 to 203.

(q) 1 Wils. 139.

(r) See decisions on this act, post, ch. vi. and Chit. Col. Stat. tit. Hundred.

(s) Ante, 161, 165, 168 to 203.

(t) Ante, 169, 170, 175.

(u) 3 Inst. 63 ; 1 Hale, 550 ; 2 East, P. C. 509 ; 2 Leach, 710 ; 4 Bla. C. 224.

(v) Latin, *crepusculum*, from *creperus*, doubtful, dark, or uncertain ; French, *crepuscule*.

(x) *Supra*, note (u).

(y) Ante, 401, 403.

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existing at the time the offence was committed. But on the other hand, if the entry be certainly before twilight has commenced, or after it has ceased, then the circumstance of the night being exceedingly moonlight will not prevent the offence of burglary from being complete. (z)

Criminal injuries and offences to INCORPOREAL property.

INCORPOREAL property, from its nature, is subject comparatively to very few criminal injuries or offences, and certainly not to most of those affecting corporeal property. When, however, such criminal injuries are recognized by law, we may observe that there are generally three descriptions of remedies or punishments: *first*, the preventive; *secondly*, those for compensation, usually only afforded when the injury was at most a misdemeanor; or *thirdly*, punishments either at common law or under particular enactment. We may premise that no injury to *real property incorporeal* can be considered a crime or an offence, unless it affect not merely one individual, but the public in general, or a great many individuals.

In case of crimes or offences to public ways or to navigable rivers or watercourses, or to any other public incorporeal right, and in which, at least in the eye of the law, all the public are interested, any individual may adopt proceedings of the above nature. Thus he may by his own act *abate* or *remove* any obstruction to a highway or public watercourse, and it is said in so doing need not observe that care in avoiding injury to materials as in abating a private injury, (a) though no one is recommended to act upon the supposition that that doctrine, which has been denied, would ultimately be holden sound and tenable. If the obstruction be in progress or continuing, a Court of Equity will by injunction prevent it. (b) If the offence complained of consist in the non-observance of a clear public duty, then the Court of King's Bench will interfere by mandamus, but if the obligation or the offence be doubtful, that Court will leave the parties complaining, first to establish the right, or duty, or obligation, and the offence, upon an indictment at common law, and not interfere till a subsequent application. (c) If any individual has sustained actual and particular injury from the obstruction or other nuisance to the public

(z) 4 Bla. C. 224.

(a) *Lodie v. Arnold*, 2 Salk. 458; and see fully *post*, chap. vii.

(b) See fully *post*, chap. viii., and *ante*,

197, 198, 200, 203.

(c) *Rex v. Corporation of Plymouth*, K. B., A. D. 1832.

right, then we have seen he may proceed in an action on the case for private and particular satisfaction. (*d*) Or for nominal *punishment*, though usually in effect to compel specific relief, or repair, or performance, any person may *indict* the party occasioning an obstruction or nuisance, or neglecting to repair, for his offence or neglect, and this either at common law, or under the General Highway Act, (*e*)* or the Turnpike Act, (*f*) or a Canal Act, or some local act; or sometimes, as under the Highway Act, he may proceed more summarily under its provisions.

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All *public nuisances* in general, and more particularly as they affect the habitation of houses, and the passing along highways, and consequently what may be termed *public incorporeal* rights, are remediable either by similar *preventive* measures, or by civil action for *compensation*, or by *public prosecution*, as on the behalf of the public. Each, of these in their order will hereafter be fully and practically considered.

(*d*) *Ante*, 11.

(*e*) 13 Geo. 3, c. 78.

(*f*) 3 Geo. 4, c. 126.

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